87-2091

No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

ALLIED VAN LINES INC.,

Petitioner,

v.

ANDREW WILKERSON,

Respondent,

and

FRUEHAUF TRAILER, a Division
of Fruehauf Corporation,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI

—o—

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June 1988

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QUESTION PRESENTED

Do the provisions of the Interstate Commerce Act at 49 U.S.C. § 304 and § 315 and I.C.C. Regulations at 49 C.F.R. § 1057, under which an I.C.C. licensee is liable to shippers and to the public for negligent maintenance and/or operation of a vehicle by its owner-operator, extend to include vicarious liability for injuries sustained by an employee of an owner-operator, classifying such an employee as a member of the traveling public?

STATEMENT OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF PETITIONER, AS REQUIRED BY RULE 28

Allied Van Lines is a wholly-owned subsidiary of National Freight Company International Holdings (U.S.A.) Inc. ("NFC-USA"). NFC-USA, an indirect wholly-owned subsidiary of National Freight Consortium p.l.c ("NFC") is a holding company designed to hold NFC's United States assets, which include primarily Merchants Home Delivery Service, Inc. and Dauphin Distribution Services, Inc.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania dismissing the appeal is set forth in the Appendix (App.) at Part 1. The opinion of the Superior Court of Pennsylvania which affirms the trial court determination with

respect to the status of the respondent, Andrew Wilkerson, as a member of the traveling public is reported at 360 Pa. Super., 523, 521 A.2d 25 (1987) and is set forth at App. Part B. The opinion of the Court of Common Pleas, Philadelphia County which determined that Andrew Wilkerson was within that classification of persons, who could recover pursuant to the provisions of the Interstate Commerce Act and regulations promulgated by the Interstate Commerce Commission, is set forth at App. Part C.

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JURISDICTION

The decision on the merits of this case was entered by the Superior Court of Pennsylvania on February 6, 1987. The decision of the Supreme Court of Pennsylvania which declined review of the Superior Court decision was issued on April 26, 1988. No application for an extension of time to file this Petition for Writ of Certiorari has ever been made. This Court's jurisdiction is involved under 28 U.S.C. § 1257(3).

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FEDERAL STATUTES AND REGULATIONS INVOLVED

The provisions of the Interstate Commerce Act at 49 U.S.C. § 304(e) regarding regulations governing the use of vehicles owned by others are set forth at App. Part E.

The provisions of the Interstate Commerce Act at 49 U.S.C. § 315 regarding security for protection of the public are set forth at App. Part F.

The provisions of Title 49, Chapter X of the Interstate Commerce Commission Rules and Regulations, Sub Chapter A, part 1057, entitled Lease and Interchange of Vehicles are set forth at App. Part G.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Petitioner Allied Van Lines is a Delaware Corporation operating as a common carrier, restricted to the transportation of household goods, pursuant to authority granted to it by the Interstate Commerce Commission in its Certificate of Public Convenience and Necessity No. MC-15735 and various sub numbers. On June 16, 1977, respondent Andrew Wilkerson incurred personal injuries as the result of a collision caused by brake failure of a tractor trailer in which he was riding as an employee of the vehicle owner-operator, Lyle Jordan, who is not a party to this action. At the time of the accident, the tractor trailer was subject to a lease agreement by which Jordan had leased the tractor trailer to one Fisher and Brother, Inc. The latter had, in turn, leased the vehicle to Allied Van Lines, under whose Certificate of Public Convenience and Necessity the vehicle was being operated at the time of the accident. At the time of the accident, Wilkerson, hired by Jordan as a furniture mover's "helper," was riding as a passenger in the cab of the tractor trailer.

The case comes to this Court as a dispute about whether Andrew Wilkerson, as an employee of the owner-operator of the vehicle, has the status of a member of the traveling public for the purpose of imposing liability based on federal law and I.C.C. regulations upon an otherwise non-negligent interstate carrier.

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PROCEDURAL HISTORY OF THE CASE

This case began by the filing of a civil action in the Court of Common Pleas, Philadelphia County, Pennsylvania by Wilkerson against Allied Van Lines and against Fruehauf Trailer, a division of Fruehauf Corporation, the party responsible for inspection and maintenance of the braking system of the subject vehicle. That portion of the Complaint which relates to the present petition, is that Allied, based on federal statutes and regulations invoked under authority of its I.C.C. license, is liable for the injuries incurred by Wilkerson, notwithstanding the absence of any negligence on its part.

The case was tried before a jury, beginning July 10, 1984. Addressing the crucial question of whether Wilkerson had the status of a member of the traveling public at the time of the accident for purposes of determining the application of the vicarious liability provisions of 49 U.S.C. § 304(e) and § 315, the trial judge instructed the jury, essentially, that Wilkerson was indeed a member of the traveling public. The jury returned a verdict against Allied and in favor of Fruehauf, awarding Wilkerson damages in the amount of eight hundred thousand ($800,-

000.00) dollars, to which the trial judge added three hundred eighty-two thousand seventeen ($382,017.36) dollars and thirty-six cents in delay damages.

Following denial of post trial motions, Allied appealed to the Superior Court of Pennsylvania on several issues, including (1) whether Wilkerson had a federally-created cause of action against Allied and (2) whether the award of delay damages was proper in the circumstances of this case. Argument was held, and in an Opinion filed February 6, 1987, the decision of the lower court was affirmed with respect to the status of Wilkerson as a member of the travelling public.[1] Allied filed a Petition for Allowance of Appeal on this issue in the Supreme Court of Pennsylvania, which was granted on November 17, 1987. Argument was heard on April 11, 1988, and on April 26, 1988, the Supreme Court of Pennsylvania determined that the appeal had been improvidently granted and it was thereby dismissed. This Petition for Writ of Certiorari timely follows within ninety (90) days from the order dismissing the appeal, as required by United States Supreme Court Rule 20.2.

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[1] The case was remanded to the trial court to determine delay damages in accordance with Pennsylvania law. Upon remand, the trial court reduced the assessment of delay damages by seven thousand four hundred fifty-six ($7,456.00) dollars. The issue of delay damages is presently on appeal before the Superior Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

I

The decision below is in conflict with the decision of the U.S. Court of Appeals for the Fifth Circuit in White v. Excalibur Insurance Co., 599 F.2d 50 (5th Cir., 1979), cert. denied, 444 U.S. 965 (1979) with respect to the question of whether the employee of an interstate carrier, of a lessee, a lessor, or the helper of any of these parties has the status of a member of the traveling public for the purpose of imposing vicarious liability based on 49 U.S.C. § 304 and § 315 and the Interstate Commerce Commission Regulations at 49 C.F.R. § 1057 upon an otherwise non-negligent interstate carrier.

The case presented calls for an articulation of federal law governing the determination of the legal responsibilities imposed upon an interstate carrier pursuant to 49 U.S.C. § 304 and § 315 and I.C.C. Regulations at § 1057. In a prior decision this Court held that the Interstate Commerce Act requires an I.C.C. lessee to assume full control and responsibility for leased vehicles with respect to injuries or losses sustained by shippers and the public. *Transamerican Freight Lines, Inc., v. Brada Miller Freight Systems, Inc.,* et al, 423 U.S. 32 (1975).

Andrew Wilkerson sustained injuries as the result of a motor vehicle accident while he was riding as a passenger in the cab of a tractor trailer owned and operated by one Lyle Jordan under the I.C.C. permit of Allied Van Lines. Wilkerson's presence in the cab was predicated on his employment by Jordan as a furniture mover's helper. The lower court determined that Wilkerson was a member of the traveling public within the contemplation of the fed-

eral law, and on this basis alone he could recover from Allied Van Lines.

In *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir. 1979), cert. denied, 444 U.S. 965 (1979) the court of appeals reached a different conclusion on similar facts. In *White* the I.C.C. licensee, Superior Trucking Company (cf. Allied) contracted with O.D. Crawford (cf. Fisher) to supply drivers and trucks to Superior. Pursuant to the contract, Crawford supplied two (2) workers and a vehicle to Superior. At the time of the accident, one worker, Lindsey, was driving while the co-worker, Wright, was resting in the cab. Wright died in the accident and his estate sued Lindsey for negligence. Wright's estate received a verdict which the estate attempted to collect from Excalibur, Superior's liability carrier.

The court of appeals affirmed the district court determination that Wright was, by virtue of federal law, a "statutory employee" of Superior, and therefore the sole remedy of his estate was workmen's compensation benefits. The court refused the claim that Wright's estate had any independent right of recovery against Superior. The U.S. Court of Appeals for the Fifth Circuit held that Wright, as a fellow employee of Lindsey, was outside the scope of the protection Congress conferred on the traveling public by 49 U.S.C. § 304 and §315. The fifth circuit recognized that it would be fundamentally unfair to impose upon an I.C.C. carrier double liability, that is, third party liability as well as a workmen's compensation claim. The court stated in *White* at 599 F.2d 53:

> To make them assume the burden of liability for the harm caused by their leased vehicles without according them the protection given employers under state substantive law would broaden their exposure to suit

> beyond that to which employers are subject. We find no warrant for such strict liability in the federal law.

The fifth circuit further stated at 599 F.2d 54:

> The total economic benefit conferred on all lessee-hired drivers by receiving workmen's compensation coverage may well exceed the detriment caused by denying them a tort remedy against the carrier for the negligence of fellow workers.

In reaching its decision, the court in *White* acknowledged that it differed from an earlier decision rendered in a fourth circuit case, *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974), stating at p. 55:

> In reaching this result we must respectfully differ with our brethren in the Fourth Circuit who decided in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 4 Cir. 1974, 494 F.2d 89, that the employee of a lessor, injured by a fellow servant who was then driving the leased truck, is a member of the public with respect to the carrier under Section 304. Despite the lack of contractual agreement between the carrier and the lessor's employees, they cannot be considered strangers to the lessee, comparable as the court in Proctor asserts, 'to members of the traveling public', when engaged in operating a leased vehicle in the lessee's business. See id at 92. *They stand apart not merely from other travelers but from all of the rest of the public who are not directly engaged in furthering the economic interest of the carrier and who are as a result made its responsibility under section 304.* For the same reasons that we have concluded that Wright was not as member of the 'public' for purposes of Ga. Code Ann. Sections 68-612, we must also hold that he was not a member of the public for purposes of the applicability of federal substantive law created by Section 304 and must seek his remedy elsewhere. (Emphasis added.)

In *Proctor*, the plaintiff was injured while riding as a passenger in a vehicle leased to an I.C.C. carrier. The U.S. Court of Appeals for the Fourth Circuit determined that the carrier, operating under an I.C.C. certificate was liable to an employee of the lessor for injuries resulting from the negligence of the lessor on the theory that the intent of the I.C.C. regulations was to make sure that licensed carriers would be responsible in fact as well as in law for leased vehicles.[2]

Based on the *White* and *Proctor* decisions, and the decision entered by the lower court in the case at bar, it is apparent that the lower court entered a decision in conflict with a decision of the U.S. Court of Appeals for the Fifth Circuit, and also, that there exists a difference of opinion on the issue presented between the courts of appeal for the fourth and the fifth circuits. In order to ensure uniform application of the law, it is requested that the Supreme Court of the United States resolve these conflicts.

II

The decision below presents an important question of federal law which has not, but which should be settled by this Court.

In order to protect the public from the torts of frequently insolvent owner-operators, in 1956 Congress

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[2] The significant difference between *Proctor* on the one hand, and *White* and this case on the other hand, is that there were no workmen's compensation benefits available in *Proctor;* therefore the court did not have to consider the employment status of the plaintiff. In the instant case, Wilkerson asserted his status, under oath, to be that of an employee of Jordan and Allied, in order to collect workmen's compensation benefits provided for in the lease agreement between Fisher and Allied.

amended the Interstate Motor Carrier Act, requiring motor carriers to assume "full direction and control of leased vehicles." 49 U.S.C. § 304(e); 49 C.F.R. § 1057.4 (a)(4). See H.R. Rep. No. 2425, 84th Cong., 2d Sess. (1956), reprinted in [1956] U.S. Code Cong. and Admin. News, pp. 4304, 4307. The text of 49 U.S.C. § 304(e) is reproduced at App. Part E. The text of 49 C.F.R. § 1057.4 (a)(4) is reproduced at App. Part G. With certain exceptions, the regulations, which were formulated in the rulemaking procedure known as Ex Parte No. MC-43, sustained in *American Trucking Assns. v. U.S.*, 344 U.S. 298 (1953), require the I.C.C. licensee to assume the responsibility for shipment of goods and to have full authority to control this activity. While the legislative history of the regulations does not address specifically the question of whether an injured employee of an owner-operator is the responsibility of the I.C.C. carrier, in the rulemaking procedure, the Interstate Commerce Commission plainly omitted reference to an owner-operator's employee or helper, stating the parameter of its intent as follows:

> It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the *shipper,* the *public,* and *this Commission* for the transportation. 52 M.C.C., at 681. (Emphasis added.)

The provisions of the I.C.C. Act were invoked by Wilkerson in the case at bar solely for the purpose of extending its provisions to a class of persons neither designated in the legislation itself nor in its history. A determination by the Supreme Court of the issue presented would settle this heretofore unresolved question. It is submitted that if the decision below is allowed to stand, it

will have serious and widespread impact upon the trucking industry operating in interstate commerce, extending the responsibility of the I.C.C. licensee well beyond that which Congress intended.

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CONCLUSION

The Petition for Writ of Certiorari to the Superior Court of Pennsylvania should be granted for the following reasons: (1) The decision in the court below is in conflict with a decision of the U.S. Court of Appeals for the Fifth Circuit, which differs from a fourth circuit decision. In order to achieve uniform application of the federal law, review by this Court is requested. (2) Since the extent to which the Interstate Commerce Act imposes vicarious liability upon an I.C.C. licensee is not set forth specifically in the legislation itself or in its rulemaking history, a determination by this Court as to whom Congress intended to protect is required in order to establish the parameters of vicarious liability to which an I.C.C. licensee is exposed.

Respectfully submitted,

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SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

ANDREW WILKERSON	)	
	)	
v.	)	No. 153 E. D.
	)	Appeal Docket
ALLIED VAN LINES, INC.,	)	1987
and FRUEHAUF TRAILER,	)	
a Division of FRUEHAUF	)	
CORPORATION	)	
	)	
Appeal of Allied Van Lines, Inc.	)	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

/s/ Marlene F. Lachman, Esq.
Prothonotary

Dated: 4/26/88

ANDREW WILKERSON	)	
	)	IN THE
vs.	)	SUPERIOR
	)	COURT OF
ALLIED VAN LINES, INC., FRUEHAUF TRAILER, A DIVISION OF FRUEHAUF CORP.	)	PENNSYLVANIA
	)	
	)	No. 2751
	)	Philadelphia, 1985
APPEAL OF: ALLIED VAN LINES, INC.	)	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby vacated and remanded with instructions. Affirmed as modified. Jurisdiction is not retained.

By the Court:

/s/ David Szewczak
Prothonotary

Dated: February 6, 1987

ANDREW WILKERSON	)	
	)	IN THE
vs.	)	SUPERIOR
	)	COURT OF
ALLIED VAN LINES, INC., FRUEHAUF TRAILER, A DIVISION OF FRUEHAUF CORP.	)	PENNSYLVANIA
	)	No. 2751
	)	Philadelphia, 1985
APPEAL OF: ALLIED VAN LINES, INC.	)	

Appeal from Order of the Court of Common Pleas, Civil Division, of Philadelphia County, No. 2730 March Term, 1979.

BEFORE: WIEAND, OLSZEWSKI and CERCONE, JJ., OPINION BY WIEAND, J.:

Filed February 6, 1987

Andrew Wilkerson was seriously injured when he was ejected from a tractor trailer which collided with an oncoming vehicle in Vernon Township, New Jersey. The tractor trailer was owned and operated by Lyle Jordan. The unit had been leased to Fisher and Brother, Inc., which, in turn, had leased the vehicle to Allied Van Lines, Inc. (Allied). The vehicle was being operated under authority contained in a Certificate of Convenience and Necessity which had been issued to Allied by the Interstate Commerce Commission. Wilkerson commenced an action against Allied and also against Fruehauf Trailer, a division of Fruehauf Corporation, which had been hired by Allied to inspect and repair the vehicle's braking system but which, it was alleged, had done so in a negligent man-

ner. A jury returned a verdict against Allied alone[1] and awarded damages of $800,000.00. The trial court added delay damages pursuant to Pa.R.C.P. 238 and, after post-trial motions had been denied, judgment was entered in favor of Wilkerson and against Allied in the amount of $1,182,027.36. Allied appealed.

Wilkerson's claim against Allied was based upon provisions of the Interstate Common Carrier Act which requires that a motor carrier assume direction and control of leased vehicles. This principle was explained by the Court of Appeals for the Fifth Circuit in *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984) as follows:

> In order to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles, Congress in 1956 amended the Interstate Common Carrier Act to require a motor carrier to assume full direction and control of leased vehicles. 49 U.S.C. §§ 10927(a)(2) and 11107(a)(4) formerly 49 U.S.C. §§ 315 and 304(e)(2) respectively). Pursuant to these regulations the ICC has promulgated written lease requirements for interstate carriers . . . which require the carrier lessee to "assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 1057.12(d)(1).

Id. at 496.[2] See: *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 36-38, 96

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[1]Fruehauf settled the claim prior to trial and took in exchange a joint tortfeasor's release. However, it remained in the action as a party-defendant throughout the trial.

[2]See: 49 U.S.C. § 11107; 49 C.F.R. 1057.

(Continued on following page)

S.Ct. 229, 233-234, 46 L.Ed.2d 169, 176-177 (1975); *Rodriguez v. Ager*, 705 F.2d 1229, 1232-1233 (10th Cir. 1983); *White v. Excalibur Insurance Co.*, 599 F.2d 50, 52-53 (5th Cir., *cert. denied*, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979); *Carolina Casualty Insurance Co. v. Insurance Co. of North American*, 595 F.2d 128, 135-137 (3d Cir.

(Continued from previous page)

49 U.S.C. § 11107 provides in relevant part:

> [T]he Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title that uses motor vehicles not owned by it to transport property under an arrangement with another party to—
>
> (1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;
>
> . . .
>
> (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

The applicable regulation provides:

> Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.
>
> . . . .
>
> (c) Exclusive possession and responsibilities—(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 C.F.R. 1057.12.

1979); *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89, 91-92 (4th Cir. 1973); *Simmons v. King*, 478 F.2d 857, 866-867 (5th Cir. 1973); *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477 (3d Cir. 1961); *Riddle v. Trans-Cold Express, Inc.*, 530 F.Supp. 186, 188 (S.D. Ill. 1982).

Because the statute and the regulations adopted pursuant thereto impose upon the carrier "both a legal right and duty to control vehicles operated for its benefit, the employees of the vehicle-lessor are deemed statutory employees of the lessee-carrier to the extent necessary to insure the carrier's responsibility for the public safety just as if the lessee-carrier were the owner of the vehicles." *White v. Excalibur Insurance Co., supra* at 53, citing *Simmons v. King, supra.* The effect of the statutes and regulations is to make the carrier-lessee vicariously liable for injuries caused to the traveling public by virtue of the negligent operation of any vehicle leased to it and operated under its certificate of necessity. See: *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra; Price v. Westmoreland, supra; White v. Excalibur Insurance Co., supra; Mellon National Bank & Trust Co. v. Sophie Lines, Inc., supra; Riddle v. Trans-Cold Express, Inc., supra; Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.Mex. 511, —, 602 P.2d 195, 200 (1979).

Allied contends in this case that it should not be held vicariously liable for the negligence of Jordan because Wilkerson was not "a member of the traveling public" which the statute and regulations were intended to protect. Wilkerson made a living by helping drivers load and unload their tractor trailers. On the day of the acci-

dent, he had been engaged in helping Jordan in the loading and unloading of Jordan's tractor trailer. After work for the day had been completed, Jordan provided transportation to Wilkerson so that Wilkerson could reach a destination convenient to him. It was then that the accident occurred.

Whether an injured plaintiff is "a member of the traveling public" at the time of the accident and, therefore, eligible to assert the federally created cause of action against the lessee-carrier, has been a source of conflict among the federal courts. In *Proctor v. Colonial Refrigerated Transportation, Inc., supra,* plaintiff had been injured while riding as a passenger in a truck which had been leased to Colonial, an interstate carrier, by Bales, the owner-operator of the truck. Bales had hired Proctor, the plaintiff, as an assistant driver. Proctor brought an action for personal injuries against Colonial. At trial, the court instructed the jurors that if they found that Bales was an independent contractor at the time of the accident, they should return a verdict in favor of Colonial. On appeal, after the jury had returned a verdict for Colonial, the Court of Appeals reversed. The Court held that federal law operated to eliminate independent contractor concepts and required Colonial to assume responsibility for the negligence of Bales as the driver of the leased vehicle. *Id.* at 92. With respect to Colonial's contention that its statutory liability did not extend to plaintiff, who had been injured while acting as an employee of the lessor, Bales, the Court emphasized that plaintiff had not been the owner of the vehicle and had had no contractual relationship with Colonial. The Court concluded that plaintiff "was as much a stranger to Colonial as a shipper

or a member of the traveling public. . . ." *Id.* The Court held, therefore, that a new trial was necessary at which the jury should be instructed that any negligence on the part of the driver, Bales, would impose liability upon Colonial, the lessee.[3]

A contrary result was reached by the Court of Appeals for the Fifth Circuit on similar facts. In *White v. Excalibur Insurance Co., supra,* the plaintiff's decedent had been hired as a driver by the lessor-owner of a truck which had been leased to the lessee-carrier. As the decedent slept in the cab, his co-driver negligently operated the truck, resulting in a collision which caused the decedent's death. Plaintiff brought a wrongful death action against the lessee-carrier, contending that federal law made the carrier vicariously liable for the driver's negligence. The trial court denied plaintiff's request for relief and, on appeal, the Court of Appeals affirmed. Inasmuch as the decedent had been an employee of the lessor at the time of the accident, the Court held, he had not been a member of the public when he was injured. The Court said that despite the absence of a contractual agreement between the carrier and the lessor's employees, the employees could not be considered to have been strangers to the lease when engaged in operating a leased vehicle in furtherance of the lessee's business. *Id.* at 55-56. Thus,

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[3]Several courts, including the Fourth Circuit, have held, however, that the lessor himself cannot be considered to be a member of the traveling public and, therefore, cannot hold the lessee responsible under federal law for injuries sustained by the lessor as a result of the negligence of his own employees. See: *War Emergency Co-op Association v. Widenhouse,* 169 F.2d 403 (4th Cir. 1948); *Riddle v. Trans-Cold Express, Inc., supra.*

the Court concluded, "[t]hey stood [apart] not merely from other travelers but from all of the rest of the public who [were] not directly engaged in furthering the economic interest of the carrier. . . ." *Id.* at 56.

Two state courts have had occasion to consider this issue. Both have embraced the reasoning of the Fourth Circuit. In *Schindele v. Ulrich*, 268 N.W.2d 547 (Minn.), *appeal dismissed sub nom., Sammons v. Schindele*, 439 U.S. 1059, 99 S.Ct. 739, 58 L.Ed.2d 716 (1978), the plaintiff and another person had been hired by the lessor to drive a truck which had been leased to an interstate carrier. Plaintiff was injured when his co-driver negligently drove the truck at a high rate of speed down a steep hill, causing an accident. In response to a contention by the carrier that it should not be held liable for plaintiff's injury because plaintiff had been an employee of the lessor at the time of the accident, the Supreme Court of Minnesota, relying upon *Proctor v. Colonial Refrigerated Transportation, Inc., supra*, decided: "Like the Court in *Proctor*, we think the lessee's assumption of 'full responsibility in respect to the equipment it is operating' requires it to assume liability to a co-driver for injury caused by the driver's negligence." *Id.* at 551.

Similarly in *Matkins v. Zero Refrigerated Lines, Inc., supra*, the Court of Appeals of New Mexico held that a lessee-carrier was liable for the damages caused when an employee of the lessor was killed while riding in a leased vehicle. There, the injured employee had been hired by the lessor as an assistant driver and was killed when his co-driver negligently operated the vehicle. The Court, referring approvingly to *Proctor v. Colonial Refrigerated Transportation Lines, Inc., supra*, concluded:

> One of the principal goals of the ICC regulation imposing responsibility on the carrier was to provide the public with financially responsible carriers. *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795 (6th Cir. 1975)[, *cert. denied*, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 302 (1975)]. In acknowledgment of that purpose, *Proctor* reasoned that plaintiff, although an employee of the negligent driver and a passenger in the truck driven by him, was as entitled to the protection intended by the Commission's regulations as any other member of the traveling public. We feel that plaintiff here, representing the estate of deceased, is entitled to the same protection under the ICC regulations, and to deny him the right to seek recovery from the carrier would undercut one of the primary purposes of the regulatory pattern.

Matkins v. Zero Refrigerated Lines, Inc., supra at —, 602 P.2d at 200.

We agree with this view. We do so because such a view is consistent with the purposes sought to be achieved by the federal law. To hold that Wilkerson was not entitled to recover from the carrier under whose certificate of necessity the truck was being operated would defeat the salutary purpose of ensuring compensation for innocent persons who have been injured as a consequence of the carrier's doing business. Although it is true that Jordan, as lessor, could not have recovered from the carrier if he had been injured by his own negligence, or the negligence of one of his employees, Wilkerson had no direct relationship with the carrier and no ownership interest in the leased vehicle. Therefore, he was a member of the public intended to be benefitted by the vicarious liability provisions of federal law. He was a member of the public within the intendment of federal law, and, as such, could recover against Allied for the negligence of Jordan.

Allied also contends that a new trial is necessary because of various alleged errors by the trial court. We will consider these arguments seriatim. The first is that the trial court erred when it permitted a police officer to testify regarding a report which had been prepared by the New Jersey Department of Law and Safety and which the officer had attached to his accident report. The report contained a statement that there had been no apparent defect in the truck's braking system. This information, Allied contends on appeal, was inadmissible hearsay. The objection, however, was waived. Allied sat silently by and waited until the officer had completed his testimony on direct examination. It was not until much later, after Allied's counsel had begun to cross-examine the witness, that an objection was made to the testimony which he had given on direct examination. This was too late. The objection was waived. See: *Kemp v. Qualls,* 326 Pa. Super. 319, 327, 473 A.2d 1369, 1373 (1984). See also: *Richardson v. LaBuz,* 81 Pa.Cmwlth. 436, 462, 474 A.2d 1181, 1197-1198 (1984).

Allied contends also that the trial court erred when it excluded testimony regarding the police officer's notation on his written report of a statement attributed to Long that the brakes on his truck had failed prior to the accident. This evidence was hearsay; and the recordation of the statement on the police report was not admissible as a business record exception to the exclusionary rule. See: *Haas v. Kasnot,* 371 Pa. 580, 92 A.2d 171 (1952). See also: McCormick on Evidence §§ 310, 324.3 (3d ed. 1984). Allied argues that even if the evidence were hearsay, the trial court should have allowed it because the police witness had previously been allowed to refer to the report

which had been made about the braking system by the New Jersey Department of Law and Safety. We reject this logic. A trial court's evidentiary rulings, if preserved for appellate review, will be tested according to established rules of evidence and not necessarily by prior rulings, correct or incorrect, made by a trial court in the same action.

The trial court did not err when it refused to allow evidence of the pre-trial settlement agreement between Wilkerson and Fruehauf. The trial court's ruling was mandated by the provisions of 42 Pa.C.S. § 6141(c), which direct that "[e]xcept in an action in which final settlement and release has been pleaded as a complete defense, any settlement . . . shall not be admissible in evidence on the trial of any matter." See also: *Weingrad v. Philadelphia Electric Co.*, 324 Pa.Super. 16, 471 A.2d 100 (1984) (error for trial court to inform jury of settlement, but error harmless). Appellant contends that the statute should be interpreted to create an exception where a settlement may be relevant to attack the credibility of testimony given by a settling party by showing bias, prejudice or interest. Appellant relies upon dictum appearing in footnote 3 which accompanied the panel opinion in *Weingrad v. Philadelphia Electric Co., supra.* However, even that panel recognized the inflexibility of the Pennsylvania statutory provision and opined only that "the public policy of promoting settlements would not be frustrated by a law . . . which permits the admission of settlements when offered to prove bias or prejudice of a witness." *Id.* at 20-21 n.3, 471 A.2d at 102-103 n.3. The trial court did not err when it refused to permit the jury to learn that the claim against Fruehauf had been settled.

In response to pre-trial interrogatories which had been filed pursuant to Pa.R.C.P. 4003.5(a), Wilkerson stated that he intended to call an expert who had examined the Jordan vehicle and had concluded that Fruehauf's inspection of the braking system prior to the accident was "completely inadequate." Wilkerson also gave Allied a copy of the expert's written report. When Wilkerson failed to call the named expert witness at trial, Allied offered the expert's written report in evidence. The trial court rejected Allied's offer, holding that the report constituted hearsay and did not fall within any exception to the rule excluding hearsay evidence. Allied contends that this was error. It argues that because the witness was a resident of Georgia and beyond the subpoena powers of the Pennsylvania court, the expert's written report was admissible pursuant to Pa.R.C.P. 4020.

Pa.R.C.P. 4020 provides as follows:

> (a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:
>
> . . .
>
> (2) The deposition of a party . . . may be used by an adverse party for any purpose.
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
>
> . . .
>
> (b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or is outside the Commonwealth, unless it appears

> that the absence of the witness was procured by the party offering the deposition. . . .

This rule, however, is not applicable to and does not support appellant's argument. In the first place, the written report which appellant sought to introduce had not been prepared by a party to the litigation. Secondly, as the trial court correctly observed, the written report was hearsay. It was an extrajudicial statement offered to show the truth of the statement made by the witness. See: *Spotts v. Reidell*, 345 Pa.Super. 37, 42, 497 A.2d 630, 633 (1985). The witness had never been deposed. He had not testified under oath and his opinion had not been tested by cross-examination.

Allied argues that the report was not inadmissible hearsay but an admission, which is an exception to the hearsay exclusion. By referring to it in his answer to interrogatories, it is argued, Wilkerson adopted the written report of its expert witness, which thereupon became admissible at Allied's instance as an admission by adoption by Wilkerson. In support of this argument, Allied cites *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *reversed in part on other grounds sub nom., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, — U.S. —, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). There, the Third Circuit Court of Appeals held that where a party answers interrogatories requesting factual information by referring to written documents, the interrogating party is entitled to assume that the contents of the documents have been adopted as the answer to the interrogatory. Moreover, the Court held, the answering party is estopped from denying the adoption. *Id.* at 301.

We agree that as a general rule, when a party answers an interrogatory requesting factual data by referring to a document, the opposing party is justified in assuming that the answering party has adopted the contents of the document. Under such circumstances, the party who referred to the document may be estopped from denying his admission of the facts recited therein. However, such a rule has no application to the instant case. Here, the only factual information requested was the name of Wilkerson's expert witness and a copy of his written opinion. Wilkerson supplied the requested information as he was required to do by Pa.R.C.P. 4003.5(a). He did not thereby adopt by admission the opinion of the expert witness whose name he had revealed. If Allied wished to pursue further its inquiry regarding the expert's opinion, it could have done so in various ways. Its failure to do so did not render the expert's written report admissible as an admission by the party who had consulted him. That report was hearsay and was properly excluded by the trial court.

Allied also contends (1) that the trial court erred by excluding a portion of Allied's response to Wilkerson's request for admissions before permitting the response to be read into evidence; and (2) that Wilkerson committed a fraud upon the court by testifying falsely at trial. Our examination of the record and relevant case law reveals that these issues are lacking in merit and deserve no discussion beyond that appearing in the trial court's opinion.

Allied's remaining assignments of error pertain to the trial court's jury instructions. In reviewing those instructions we are guided by the principle that "when the propriety of the jury instruction of the trial court is at issue, those instructions must be viewed in toto to determine if

any error has been committed. Unless the charge as a whole can be demonstrated to have caused prejudicial error, we will not reverse for isolated inaccuracies." *Riddle Memorial Hospital v. Dohan*, 504 Pa. 571, 576, 475 A.2d 1314, 1316 (1984) (emphasis in original), citing *McCay v. Philadelphia Electric Co.*, 447 Pa. 490, 291 A.2d 759 (1972); *Vanic v. Ragni*, 435 Pa. 26, 254 A.2d 618 (1969). Moreover, unless a specific exception has been taken to an alleged error in the trial court's instructions, the alleged error will be deemed waived and will not be considered by a reviewing court. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974); *Orlando v. Herco, Inc.*, 351 Pa.Super. 144, 505 A.2d 308 (1986); *Pratt v. Stein*, 298 Pa.Super. 92, 444 A.2d 674 (1982); *Crosbie v. Westinghouse Elevator Co.*, 297 Pa.Super. 304, 443 A.2d 849 (1982).

Allied's first objection to the court's charge is that the court gave the jury inadequate latitude to determine for itself whether Wilkerson had been a member of the traveling public. Although factual disputes were for the jury to resolve, the ultimate determination of whether Wilkerson was entitled, in view of the facts, to the benefit of the vicarious liability provisions of federal law and ICC regulations was an issue of law for the court. We have reviewed the facts and conclude that Wilkerson, as a matter of law, was a member of the traveling public. When the trial court left it to the jury to determine this issue, Allied received an instruction which was more favorable than it was entitled to receive. Therefore, Allied is not entitled to a new trial because the court left it to the jury, with careful instructions, to determine whether Wilkerson was a member of the traveling public.

The trial court told the jury that "[e]xperts for both [Wilkerson] and Allied agree that the cause of the accident was not a failure of the tractor brakes." This statement was inaccurate. Allied's expert had testified that the brakes were defective prior to the accident and also at the time when Fruehauf had made its inspection. A review of the trial transcript reveals, however, that despite opportunity to object, Allied failed to call this error to the attention of the trial court. The issue, therefore, was waived. Moreover, the effect of the court's jury instructions, when considered in their entirety, was to submit the brake issue to the jury for determination.[4] The court did not remove this issue from the jury's consideration.

Finally, Allied contends that the trial court (1) improperly withheld from the jury the issues of primary and secondary liability and joint venture status; and (2) improperly slanted its charge in favor of Wilkerson and Fruehauf and against Allied. We have carefully reviewed the court's charge in light of Allied's arguments and conclude that no error was committed. Allied's contention that a new trial is necessary, therefore, is without merit.

The final matter requiring review is the trial court's order adding delay damages pursuant to Pa.R.C.P. 238. In *Craig v. Magee Memorial Rehabilitation Center*, — Pa. —, 515 A.2d 1350 (1986), the Supreme Court suspended the mandatory provisions of Rule 238, holding that by assessing delay damages against tortfeasors without providing a forum to assess fault for the delay, "the

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[4]In its argument of this issue, Allied also alleges that the trial court improperly emphasized Fruehauf's defenses and evidence over that of Allied. Our review of the court's charge fails to substantiate this allegation.

ends sought [by the Rule] run too tight a gauntlet through Due Process. . . ." *Id.* at —, 515 A.2d at 1353. In place of the suspended provisions of the Rule, the Court directed that claims for delay damages be presented by petition to the trial court for determination after hearing. Although the suspension of Rule 238 is to be given prospective application, where the issue has been preserved, it is to be resolved in a manner consistent with the Supreme Court's decision. Our review of the record discloses that this issue was preserved by Allied at the time of trial and in post-trial motions. Therefore, we will remand to the trial court to determine appellant's liability, if any, for delay damages in accordance with *Craig v. Magee Memorial Rehabilitation Center, supra.*

The portion of the judgment which exceeds $800,000.00 is vacated, and the case is remanded to the trial court to determine the delay damages, if any, which appellee is entitled to recover. As so modified, the judgment is affirmed. Jurisdiction is not retained pending determination of delay damages.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

ANDREW WILKERSON	)	
	)	MARCH
vs.	)	TERM
	)	1979
ALLIED VAN LINES, INC., and	)	
FRUEHAUF TRAILER,	)	
A Division of	)	NO. 2730
FRUEHAUF CORPORATION	)	

OPINION

KREMER, J.

DATED: March 26, 1986

I. INTRODUCTION

This is a negligence case in which plaintiff, Andrew Wilkerson (hereinafter "Wilkerson" or "plaintiff"), recovered damages for permanent, massive injuries arising out of a June 16, 1977 motor vehicle accident, when he was riding as a passenger in a tractor-trailer, which went out of control on a long downhill portion of Route 515 in Vernon Township, New Jersey. The owner and driver, Lyle Jordan (hereinafter "Jordan") (not a party to this action) operated the tractor-trailer in interstate commerce under the authority of a certificate of convenience and necessity issued by the Interstate Commerce Commission (ICC) to defendant, Allied Van Lines, Inc. (hereinafter "Allied").[1]

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1. In November of 1976, Jordan contracted with Fisher & Brother, Incorporated (hereinafter "Fisher") to drive his tractor-trailer as an independent contractor for Fisher or its lessees. Subsequently, Fisher entered into a vehicle and operator lease agreement with Allied.

Plaintiff claimed that, under applicable law, Allied was legally responsible for the damages and injuries caused by the conduct of Jordan. Plaintiff also sued Fruehauf Trailer, a Division of Fruehauf Corporation (hereinafter "Fruehauf"), based on a May 20, 1977 brake inspection of the tractor-trailer in Los Angeles, California.[2] Allied denied liability and joined Fruehauf.

On July 10, 1984, jury trial commenced[3] and on July 25, 1984, the jury returned a liability verdict against Allied and in favor of Fruehauf[4] and awarded plaintiff damages in the amount of $800,000.00. Thereafter, the court added damages for delay, pursuant to Pa.R.C.P. 238, in the sum of $382,027.36, for a total molded and amended verdict of $1,182,027.36.

Allied filed post-trial motions for judgment n.o.v. and alternatively for a new trial. The post-trial motions were rejected and judgment was entered for plaintiff in the amount of the molded and amended verdict.

II. BACKGROUND OF THE CASE

On June 16, 1977, Andrew Wilkerson assisted Lyle Jordan in the loading and unloading of Jordan's tractor-

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2. Jordan operated the vehicle for over 5000 miles between California and New Jersey after the Fruehauf inspection and prior to the accident. He was required under federal law to inspect the brakes daily. In June of 1980, Fruehauf entered into a joint tortfeasor release with plaintiff in the amount of $247,500.00. See discussion at Part IV-C, *infra*.

3. There was proper jurisdiction. See generally 42 Pa.C.S.A. § 53301.

4. By order dated August 14, 1984, the court molded the jury's verdict to include a finding in favor of Fruehauf as to the actions for contribution and/or indemnity and cross-claims filed by Allied against Fruehauf.

trailer. As on prior occasions, Mr. Wilkerson agreed to work for Jordan as a helper for that day only. As in the past, Jordan picked up Wilkerson at a convenient spot at the start of the day. The parties understood that Jordan would pay Wilkerson upon conclusion of the day's work.[5] Wilkerson entered into similar agreements with other tractor-trailer operators when work was available.

On the day of the accident, Jordan was solely responsible for the control over the supervision of the work of Mr. Wilkerson. Mr. Wilkerson's task that day was to aid Jordan in loading the tractor-trailer with household goods from the home of Theodore Grow which was located off Route 515 and uphill from the accident site.

After the Grow job was completed, Wilkerson was riding back to a convenient drop-off point. The accident occurred when Jordan descended the hill approaching Route 515 and when he negligently operated the heavily-loaded tractor-trailer, at an excessive rate of speed and in an improper gear, northbound on a 2.2 mile winding and narrow downgrade on Route 515. Jordan failed to control the tractor-trailer and crossed into the oncoming lane of travel. The tractor-trailed skidded 582 feet, struck a southbound automobile, and killed the occupant, Flora Weinberg (hereinafter "Weinberg").[6]

The tractor-trailer overturned after the collision with the Weinberg automobile and Wilkerson was ejected from

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5. Jordan, as was customary and usual among tractor-trailer operators, paid Wilkerson before they left the last work stop of the day.

6. A separate lawsuit, discussed *infra*, was brought on behalf of Weinberg.

the passenger seat. The tractor-trailer came to rest (292 feet downhill from the point of impact with the Weinberg vehicle) against a rock wall. Miraculously both Jordan and Wilkerson survived the crash. Jordan was found lying on the roadway. Mr. Wilkerson was discovered impaled on the branch of a tree amongst a group of trees along the rock wall. A tree branch was driven through the mid portion of his body and he hung there until help arrived and took him down.

Mr. Wilkerson's list of injuries reads like an abstract from *Gray's Anatomy of the Human Body.* He sustained a small hemoperitoneum, rupture of the right kidney requiring exploratory laporotomy and right nephrectomy; pneumothorax on right side requiring closed thoracotomy with underwater drainage; fractured ribs 6th through 12th on right side; fractured ilium, right; fractured pelvis; multiple contusions and lacerations of right abdominal wall and right ileal region, acute tubular necrosis; injury to left kidney; post-traumatic hypertension; injury to the heart and cardiovascular system; traumatic transverse cardiac diameter injury; injury to the bladder, renal trauma; massive lesion of right quadrant, retroperitoneal hematoma; partial calcification of muscle mass secondary to avulsion fracture with secondary scarification of muscle mass of right ilium; traumatic depression of the corneal and pharyngeal reflexes; fracture of the left clavicle; injury to the right shoulder, injury and weakness of right hip, right sciatrophy, one-half inch shortening of right lower extremity, hip abductor weakness; post-traumatic limp, lumbosacral strain and sprain; cervical strain and sprain; cerebral concussion; post concussion syndrome; right sciatic neuritis; right intercostal neuralgia; severe contusion

of right shoulder with limitation of movement; traumatic anxiety psychoneurosis; injury to the left foot and ankle; traumatic depression; contusions, abrasions and lacerations in and about the head, body and limbs; 8 inch scar of abdomen; two 4-inch keloid scars of right thoracic area; other additional scarring in and about the body.

Mr. Wilkerson underwent extensive hospitalization and medical care. He was in extraordinarily excellent physical condition prior to the accident and somehow escaped death. He has, however, permanent orthopedic and organic disabilities as well as some psychological difficulties resulting from the accident.

Plaintiff subsequently developed superglottic cancer of the larynx requiring a total laryngectomy, right radical neck dissection, and right hemi-thyroidectomy with dermal graft, requiring four hospitalizations for diagnostic and surgical procedures as well as for treatment of post-operative problems including an abscess of the neck and repair of a pharyngeal fistula. Dr. Paul Chodosh, an otolaryngologist, testified that had it not been for the severe injuries which plaintiff sustained in the accident, and in particular to his neck area, and the fact that the symptomatology of plaintiff's cancer seemed to be attributable to the injuries he suffered in the accident, plaintiff's cancer, which actually was present for at least 12 to 18 months prior to Mr. Wilkerson's seeking treatment from Dr. Chodosh, could have been and would have been diagnosed at a significantly earlier stage. An earlier diagnosis would have resulted in less radical surgical intervention, and plaintiff's vocal chords and voice box would have remained intact.

Mr. Wilkerson continues to suffer from intermittent headaches, pain in the back of the neck, severe pain in the lower back, severe unremitting pain in the right hip, pain and limitation of motion of the right arm, difficulty with his left foot and continued chest pain.

Mr. Wilkerson has a residual surgical scar from just below the sternum to the pubic area, a scar from a healed laceration over the right iliac crest and a very large keloid scar over the right flank. As a result of his total laryngectomy, Mr. Wilkerson has extensive scarring of the neck secondary to surgery and skin flap at the site. He must now speak by glottal method, a technique whereby air is swallowed and regurgitated to produce sound, since he no longer has a larynx.

Mr. Wilkerson was born on August 6, 1929. He sustained in addition to his past and future pain and suffering, substantial past and future losses of earnings from his inability to work as a helper for the various tractor-trailer operators who utilized his services (or his inability to work at any other gainful employment).

The jury's liability verdict against Allied and in favor of Fruehauf was fair and reasoned and was in accordance with the evidence. The damages awarded were quite modest, perhaps too modest, in light of the devastating injuries.[7] We review below the matters complained of on

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7. On August 3, 1984, plaintiff filed a Motion for New Trial Limited to Damages on the ground that the amount of damages awarded was against the overwhelming weight of the evidence and was grossly inadequate in view of the uncontroverted enormity of plaintiff's physical and eco-

(Continued on following page)

appeal as set forth in the statement filed by Allied pursuant to Pa.R.A.P. 1925(b).

III. ALLIED WAS NOT ENTITLED TO JUDGMTNT N.O.V.

Allied complains that "the Court should have entered Judgment Notwithstanding the Verdict on Behalf of Allied Van Lines . . ."

Upon consideration of a request for judgment n.o.v., a reviewing court must consider the evidence, together with all inferences reasonably deducible therefrom, in the light most favorable to the verdict winner, concomitantly rejecting all unfavorable evidence and inferences. All conflicts in the evidence must be resolved in favor of the verdict winner. See *Connolly v. Philadelphia Transportation Company,* 420 Pa. 280, 282, 216 A.2d 60, 62 (1966); *McDevitt v. Terminal Warehouse Company,* 304 Pa. Super. 438, 442, 450 A.2d 991, 993 (1982).

A judgment n.o.v. may be granted only in a clear case and only when the facts are such that no two reasonable persons could fail to agree that the verdict was incorrect and improper. Any doubts must be resolved in favor of the verdict. See *Broxie v. Household Finance Co.,* 472 Pa. 373, 380, 372 A.2d 741, 743 (1977); *Cummings v. Borough*

(Continued from previous page)

nomic damages losses. There was considerable merit to plaintiff's contentions. However, plaintiff did not pursue this motion at the time of post-trial argument. See generally *Stoken v. Turnbull,* 480 Pa. 71, 389 A.2d 90 (1978). Allied, for obvious reasons, made no post-trial challenge as to damages. In any event, we are of the view, for reasons discussed *infra,* that under no circumstances should the *liability* aspects of this case have to be retried.

of Nazareth, 427 Pa. 14, 25-26, 233 A.2d 874, 881 (1967). Where the facts and inferences have been conflicting and the jury has made its determination, grounded in the evidence, the province of the fact-finder may not be invaded. *Stewart v. Chernicky,* 439 Pa. 43, 266 A.2d 259 (1970). The constitutional right to trial by jury commands no less. In this case the verdict was not only supported by sufficient evidence, it was in affirmative accord with the weight of the evidence.

We (briefly) review the two n.o.v. contentions raised on appeal by Allied.

A. ANDREW WILKERSON WAS A "MEMBER OF THE TRAVELING PUBLIC" ENTITLED TO ASSERT AN ACTION AGAINST ALLIED

Allied complains as follows: "Andrew Wilkerson, the plaintiff, failed to prove that he was a member of the traveling public at the time of the happening of the accident herein. Consequently he has failed from a factual standpoint and as a matter of law to establish himself within a classification of persons that may assert a cause of action against a non-negligent interstate commerce licensee such as Allied Van Lines."

Under federal law, Allied, as a certified interstate carrier, was required to have "full direction and control" of the vehicles that were leased to it. Under statute, as a lessee, Allied was "fully responsible" for the operation of vehicles obtained through lease agreements as if it were the owner of those vehicles. See 49 U.S.C. § 304. Members of the traveling public who are not directly engaged in furthering the economic interests of the carrier are made

the responsibility of the carrier under section 304. See *Price v. Westmoreland,* 727 F.2d 494, 497 (5th Cir. 1984).

Allied was required to comply with the regulations promulgated by the ICC. Under 49 C.F.R. § 1057.4(a)(4), Allied could utilize leased equipment only if, for the duration of the lease contract, Allied ". . . provide[d] for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility thereto . . ."

In *Alford v. Major,* 470 F.2d 132, 135 (7th Cir. 1972), the court concluded that the purpose of the ICC regulations "was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and supervision of borrowed drivers."

In denying its responsibility, Allied steadfastly relied upon the case of *White v. Excalibur Insurance Company,* 599 F.2d 50 (5th Cir. 1979), *cert. denied,* 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979). *White* is factually dissimilar. Instead, we were guided by the case of *Proctor v. Colonial Refrigerated Transportation,* 494 F.2d 89 (4th Cir. 1974), which held that an interstate carrier, which leased a tractor-trailer from the owner-operator, was liable to a passenger-employee of the owner-operator injured as a result of the owner-operator's negligence in operating the vehicle.

The defendant in *Proctor,* just as Allied here, argued that its responsibility to the public under regulations promulgated by the ICC did not extend to the passenger-employee. The reasoning of the Fourth Circuit in the context of the applicable federal regulations, was persuasive

that the employee of the owner-operator is as much a stranger to the interstate carrier as a shipper whose goods are in the vehicle or a member of the traveling public.

A close analysis of the factual circumstances in *Proctor* highlights the weakness of Allied's position. From an economic viewpoint, the plaintiff in *Proctor,* who was hired to assist in driving the vehicle through several states, had much more at stake in the operation of the vehicle than did Mr. Wilkerson. Moreover, unlike the plaintiff in *White v. Excalibur Insurance Company,* Mr. Wilkerson was not "indispensable to continual vehicle operation." See 49 C.F.R. § 395.3(a) (1977).

Among the many factors dispositive in plaintiff's favor was that Mr. Wilkerson had no ownership interest in the tractor-trailer. Additionally, he had no economic interest in any of the contracts made by Jordan, Fisher, or Allied. Moreover, Mr. Wilkerson *never* drove the vehicle.

The ICC regulations were promulgated, at least in part, to do away with an abuse of lease arrangements in the trucking industry. In the final analysis, to allow Allied to escape legal responsibility, because of its lease agreements, would undercut at least one of the primary purposes of the regulations. See generally *Matkins v. Zero Refrigerated Lines, Incorporated,* 93 N.M. 511, 602 P.2d 195 (1979).

Accordingly, we rejected the argument that Andrew Wilkerson was not within a classification of persons who could recover against Allied. The court properly refused to grant judgment n.o.v.

B. ANDREW WILKERSON'S CAUSE OF ACTION WAS NOT BARRED BY AN EMPLOYER-EMPLOYEE RELATIONSHIP

Allied asserts that "the relationship between Andrew Wilkerson and Allied Van Lines is one of employer and employee as established by the evidence offered at the time of trial. Consequently, Andrew Wilkerson's remedy is that of workmen's compensation only."

A review of the entire record demonstrates that Allied's argument was without merit. The evidence (as summarized *supra*) revealed that Andrew Wilkerson was not the employee of Allied. He was the helper of Lyle Jordan. There was no master and servant relationship between Allied and Wilkerson under traditional common law doctrines, and Wilkerson never entered into any employment contract with Allied.

The reliance by Allied on *White v. Excalibur Insurance Company, supra,* is incorrect. The distinction which Allied sought to draw between the *White v. Excalibur Insurance* case and the *Proctor case,* as to the availability of the Workmen's Compensation remedy, was not applicable to this case.

There was no "statutory employer" concept insulating Allied against tort liability. In *White v. Excalibur Insurance Company,* the court held (599 F.2d at 53) that the plaintiff's sole remedy was under the workmen's compensation law of Georgia.

The New Jersey law applicable to this case is clearly distinguishable from the Georgia law which was at issue in *White v. Excalibur Insurance Company.* Under Georgia

law, a general contractor may be liable for workmen's compensation benefits to the employee of a subcontractor who is unable to make compensation benefit payments to his employee. In *White*, the court held that the increased exposure through workmen's compensation law resulted in immunity from third party tort actions.

In *Boehm v. Witte*, 95 N.J. Super. 359, 231 A.2d 240 (1967), the court construed New Jersey workmen's compensation law and reached a contrary conclusion. The relevant provision, N.J.S.A. § 34:15-79, states in part:

> "Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workmen's compensation insurance as required by this article, become liable for any compensation which may be due an employee * * * of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement."

The *Boehm* court held (95 N.J. Super. at —, 231 A.2d at 242) that an injured employee of a subcontractor who collected benefits from a general contractor because his employer had no workmen's compensation coverage could maintain a third-party action against the general contractor. The court reasoned that the purpose of N.J.S.A. § 34:15-79 was to protect the employee without impairing any common law rights and not to relieve the general contractor from responding for negligently caused damages. See also *Corbett v. Starrett*, 105 N.J.L. 228, 143 A. 352 (E&A 1928).

The *Boehm* court made it clear (95 N.J. Super. at —, 231 A.2d at 244) that N.J.S.A. § 34:15-79 was "never intended to place the general contractor in the position of

employer, thus immunizing himself from a third-party negligence action."

Allied argued that the statutory law of New Jersey "protects Allied from liability because of the control exercised by Lyle Jordan, by the employment of the plaintiff and by the recovery of workmen's compensation by the plaintiff."

The contentions of Allied ring hollow when it is considered that the issue of workmen's compensation was hotly litigated prior to the trial of this case. See discussion at Part IV E., *infra*. Ironically, Allied vigorously opposed the payment of workmen's compensation to Andrew Wilkerson and never provided any benefits.[8] Nevertheless, we reviewed the authorities cited by Allied in support of its position. We were not persuaded, and we properly refused to bar Andrew Wilkerson's cause of action due to the employer and employee issues in the case.

In the final analysis, plaintiff may well be correct in his assessment that the trial court erred in not declaring, as a matter of law, that Mr. Wilkerson was a member of the public entitled to he protection provided by ICC regulations. Nevertheless, all contested issues of liability were submitted to the jury as questions of fact and were submitted in accordance with the requests of Allied.

We were ultimately guided by the fundamental proposition that judgment n.o.v. should only bc entered in the clearest of cases and only after the court has sought out

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8. Lyle Jordan never arranged for workmen's compensation coverage for his helpers. Pursuant to a contract between Fisher and Jordan, the compensation carrier of Fisher ultimately paid benefits to Mr. Wilkerson.

and considered the evidence supporting the verdict. See e.g., *O'Malley v. Peerless Petroleum, Inc.*, 283 Pa. Super. 272; 286-87, 423 A.2d 1251, 1259 (1980). In this case there was sufficient and ample evidence to submit the question of the liability of Allied to the jury. The verdict was in accord with the affirmative weight of the evidence. Allied's contentions were incorrect and its motion for judgment n.o.v. was properly rejected.

IV. ALLIED WAS NOT ENTITLED TO A NEW TRIAL

The refusal of a new trial is usually a matter of the trial judge's discretion. The decision of the trial court should not be disturbed on appeal absent a clear issue of discretion. See *Canery v. Southeastern Pennsylvania Transportation Authority*, 267 Pa. Super. 382, 391, 406 A.2d 1093, 1097 (1979). In *Warren v. Mosites Construction Company*, 253 Pa. Super. 395, 403, 385 A.2d 397, 401 (1978), Judge (later President Judge) Cercone stated that "[u]nless there is a substantial reason therefor a new trial should not be granted in a negligence case." In *Gombar v. Schaeffer*, 202 Pa. Super. 282, 285, 195 A.2d 527, 528 (1963), the court noted that this doctrine is especially true in "days of intractable back-logs in many trial courts."

The present crisis of congestion in our courts is well documented. In *Gosha v. City of Philadelphia et al.*, 7 Phila. 302, 304, 30 Pa. D.&C.3d 190, 192 (Kremer, J., 1982), *affirmed*, 84 Pa. Cmwlth. 466 479 A.2d 85 (1984), *allocatur denied*, Supreme Court of Pennsylvania, No. 585 E.D. Alloc. Dkt. 1984 (March 13, 1985), the court commented

that "Philadelphia County has a docket crowded with approximately 24,000 to 26,000 civil cases."

An examination of the record of this case reveals that all parties received a fair trial and that the verdict of the jury was a reasonable one. There was no basis upon which to grant Allied a new trial.

We review the matters which Allied alleges (on appeal) require the grant of a new trial.

A. THE NEW JERSEY MOTOR VEHICLE INSPECTION REPORT WAS PROPERLY ADMITTED INTO EVIDENCE

Allied contends in its Rule 1925(b) statement that the trial judge erroneously admitted into evidence an "unidentified and unauthenticated document by an agency of the state of New Jersey, which document removed a critical issue from the jury's consideration; that is, whether or not the brake failure herein was attributable to co-defendant Fruehauf Trailer."

The document to which Allied refers is a report of the State of New Jersey Department of Law and Public Safety entitled Driver-Equipment Compliance Check No. 215035. See Exhibit P-41.

Allied argued that the plaintiff failed "to lay the requsite foundation" for admission of the New Jersey state agency report. Counsel for Allied moved to strike the testimony of Walter F. Wooton, the investigating officer, as to the investigation performed on the tractor-trailer by State of New Jersey motor vehicle inspectors, on the ground that it was hearsay.

Preliminarily, we note that the motion to strike was made much too late. Allied made no proper objection at the time the witness first testified as to the contents of the motor vehicle report. By failing to make a timely objection, Allied waived any later objection to reference to the report. Under Pennsylvania law, a party may not sit idly by and hear evidence and then later raise an objection. See e.g. *Commonwealth v. Washington*, 274 Pa. Super. 560, 567, 418 A.2d 548, 552 (1980).[9]

In any event, the report met the requirements of 42 Pa.C.S.A. § 6108, the Uniform Business Records as Evidence Act. The general rule of the Act provides:

> "General Rule. A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission."

In *Thomas v. Allegheny and Eastern Coal Company*, 309 Pa. Super 333, 340, 455 A.2d 637, 640 (1982), Judge Van der Voort declared that "[w]hether a document should be admitted under the 'business record' exception is within the discretionary power of the trial court pro-

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9. The court made sure that the parties were aware of their strict obligations to properly place objections on the record under *Tagnani v. Lew*, 493 Pa. 371, 426 A.2d 595 (1981) and *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974) and their progeny. See e.g. the court's Memorandum of Pre-Trial Conference and Case Management Order dated April 11, 1984.

vided such is exercised within the bounds of the Uniform Act [citations omitted]."

The trial court admitted the report into evidence only after full inquiry into the nature of the document. Officer Wootton investigated the accident and prepared an official police report (Exhibit P-2) with photographs. He testified that he ascertained that the Allied Van Lines tractor and trailer caused skid marks at the scene of the crash.

The challenged aspect of the report was of a State of New Jersey inspection required to be kept in normal course with the accident report compiled by Officer Wootton. The investigating officer, pursuant to statutory authority, requested the inspection and was personally familiar with the document as an official business record of the State of New Jersey. Officer Wootton was then sufficiently qualified under the Business Records Act to testify as to the identity of the document and the circumstances surrounding its preparation.

The inspection report was prepared on the day of the inspection, and the inspection occurred the day following the accident. Allied failed to establish that the trial judge abused his discretion since the record "was made in the regular course of business at or near the time of the act" in accordance with 42 Pa.C.S.A. § 6108. See generally *Henderson v. Zubik,* 390 Pa. 251, 254, 136 A.2d 124, 126 (1957).

The testimony of the investigating officer with regard to the preparation of the New Jersey inspection record provided a proper foundation for the admission of the

document under Pennsylvania law. The testimony justified "a presumption of trustworthiness" which "offset the heresay character of the evidence." See *In re Estate of Indyk*, 488 Pa. 567, 572, 413 A.2d 371, 373 (1979).

For similar reasons, we also rejected Allied's contentions that the New Jersey document fell within a prohibition against admission of investigation reports and that the officer witness had no personal knowledge of the findings from the inspection. The New Jersey state employee, who performed the inspection for the investigating officer, was under a statutory duty to perform his inspection and record his findings. There was no significant impact on the presumption of trustworthiness of the business record, especially since lack of personal knowledge does not necessarily preclude the admissibility of a business record. See e.g. *Siler v. City of Harrisburg*, 54 Pa. Cmwlth. 303, 306, 422 A.2d 704, 705 (1980).

There was no basis to overturn the evidentiary determination of the trial judge since, as to the disputed document, "the source of information, method and time of preparation were such as to justify its admission" under Section 6108. Allied failed to dissuade us from concluding that the New Jersey report had sufficient indicia of "trustworthiness" arising from the manner in which the business record was kept. See generally *Fauceglia v. Harry*, 409 Pa. 155, 160, 185 A.2d 598, 601 (1962).

In a final analysis, there was no prejudicial error to Allied. Regardless of the report, the trial court, as part of its comprehensive charge (see discussion at Part IV F, *infra*), left it for the jury to decide whther the brakes (all or some or none) worked at the time of the accident. The

trial judge left for the evaluation of the jury the extensive skid marks at the accident scene.

A review of the record demonstrates overwhelmingly that there was no brake failure which the jury could have attributed to Fruehauf. There was ample testimony to convince the jury that the brakes did not fail. The new Jersey inspection report, in essence, was cumulative.

Allied had the burden of establishing that the New Jersey document was admitted into evidence erroneously and that its admission caused an incorrect result. See *Robinson v. City of Philadelphia*, 329 Pa. Super. 139, 145, 478 A.2d 1, 4 (1984). In addition to having not made a timely objection during trial, Allied failed to sustain this important burden. Accordingly, Allied's request for new trial on this ground was properly rejected.

B. THE STATEMENT OF LYLE JORDAN WAS PROPERLY EXCLUDED

Allied alleges on appeal the following ground for new Trial:

> "The trial judge's refusal to permit during the course of cross-examination questions concerning a statement by Lyle Jordan which was a part of the investigating police officer's file, upon which file he gave testimony except for the statement to which reference was made upon cross-examination."

Counsel for Allied during cross-examination asked Officer Wootton:

> "Q. Now, officer, did you take a statement from Lyle Jordan?
>
> A. Yes. I did.

Q. Is that a part of your official record, sir?

A. Yes, it is.

MR. O'BRIEN: If Your Honor please, I ask the Court to make the same ruling with respect to that statement as you just made with respect to the document that I objected to, sir."

Counsel for Fruehauf objected on grounds of hearsay.

The statement was taken by Officer Wootton while Mr. Jordan was in the Intensive Care Unit of Saint Anthony's Hospital in Warwick, New York. Its reliability and veracity, which were not the subject of in-court cross-examination, were therefore suspect. In addition, the parties had previously stipulated to the use, for trial purposes, of a deposition taken of Mr. Jordan. Thus, the parties had ample opportunity, at time of deposition, to explore the possibility of substantive use of the hospital statement.

Allied argued that "[t]he action on the part of the trial judge in allowing the admission of one segment of Officers Wootton's records [see discussion at Part IV A, *supra*] while denying the admission of another segment of the same record flies in the face of logic." Allied argued that the preclusion of the Jordan statement was, under the circumstances, prejudicial and reversible error.

Allied cited no authority for the novel proposition that there is a binding obligation on the trial judge to couple evidentiary rulings. The trial court, in this instance, accurately and properly evaluated each separate item of evidence and made independent and correct rulings.

The contention that the trial judge should have permitted Officer Wootten to read the out-of-court statement

of Mr. Jordon to the jury was properly rejected. The statement was offered by Allied to prove the truth of the matters asserted. The statement contained an exculpatory reference to the failure of the brakes to operate just prior to the accident. The burden was on Allied to establish the admissibility of this out-of-court statement. At trial, Allied pointed to no acceptable exception to the hearsay rule to permit or justify its admission. The trial court, thus, committed no reversible error. See, e.g., *Haas v. Kasnot*, 371 Pa. 580, 586, 92 A.2d 171, 174 (1952).

Accordingly, the refusal to allow the out-of-court statement of Lyle Jordan to be read to the jury was not a ground for new trial.

C. THE COURT PROPERLY BARRED ALLIED FROM INTRODUCING INTO EVIDENCE THE FRUEHAUF JOINT TORTEFEASOR RELEASE

Allied complains on appeal that the trial court erroneously "fail[ed] to permit into evidence the release executed by the plaintiff in favor of Fruehauf." Allied argued that "[t]he court erred because the release was directly probative of the issue of the collusion between Wilkerson and Fruehauf." Allied contended that "[b]ecause defendant Fruehauf essentially assumed a role of advocate on behalf of the plaintiff for the assertion of plaintiff's claim against Allied, the release should have been permitted to be brought to the attention of the jury."

The refusal by the trial judge to admit the joint tortfeasor release into evidence was proper under Pennsylvania law. The Judiciary and Judicial Procedure provision pertaining to the effect of certain settlements, 42 Pa.

C.S.A. § 6141, provides as to personal injury claims as follows:

> "(a) Personal injuries. - Settlements with or any payments made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.
>
> * * *
>
> (c) Admissibility in evidence. - Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment . . . shall not be admissible in evidence on the trial of any matter."

The trial judge did not commit reversible error by refusing to permit Allied to introduce the release, executed by Andrew Wilkerson in favor of Fruehauf, since that evidence was barred under the law of this Commonwealth. In view of the unequivocal language of section 6141, Allied had no basis for complaint. Indeed, it would have been reversible error to allow Allied to introduce evidence of the settlement between plaintiff and Fruehauf. Counsel for Allied, representing a litigant with far superior economic power was more willing to induce error and risk a mistrial. Such forensic strategy should not be sanctioned or encouraged.

The cases relied upon by Allied in support of its request for post-trial relief are inapposite. All terms of the settlement between the plaintiff and Fruehauf were made known to Allied. There was no secrecy, no provision for

the return of funds to the settling tortfeasor depending upon the amount of jury verdict, and no guarantee by the settling defendant as to a minimum recovery for the plaintiff. Allied failed to prove any special or extraordinary cooperation between Fruehauf and Andrew Wilkerson in this case which required the fact of settlement to be made known to the jury. Allied failed to demonstrate any recognizable exception to the directive language of section 6141.

Allied had the same opportunity to negotiate settlement and execution of a joint tortfeasor release with the plaintiff as did Fruehauf. In essence, what counsel for Allied demanded was a reward and advantage[10] for not settling without the risks and disadvantages which arise out of another party effecting settlement. Such audacity we refused to sanction.

By seeking to place the joint tortfeasor release before the jury, Allied was endeavoring to explore a collateral matter and to upset generally accepted sound reasoning, in addition to clear and binding statutory authority. Joint tortfeasor releases are excluded because they are irrelevant to the jury's deliberations as to the issues of liability and damages. Moreover, such exclusion advances the public policy which favors settlement of legal disputes. See generally *Young v. Verson Allsteel Press Company,* 539 F.Supp. 193 (E.D.Pa. 1982).

Pennsylvania follows the majority rule which places any evidence of a plaintiff's settlement with a joint tortfeasor "beyond the jury's grasp." Allied failed to demon-

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10. See e.g. 42 Pa.C.S.A. § 8321 et seq.

strate why the trial judge should have overturned established statutory and decisional authority. Accordingly, Allied's request for new trial on this ground was properly rejected.

D. THE RULINGS WITH REGARD TO REQUESTS FOR ADMISSION WERE PROPER

Allied asserts on appeal as ground for a new trial "[t]he trial judge's refusal to permit into evidence [certain of its own] answers to Requests for Admissions." Allied contended "that its responses to plaintiff's request for admissions were made in good faith and fully complied with Rule 4014(b) [of the Rules of Civil Procedure] and should have been read before the jury in their entirety." We found otherwise.

Rule 4014 provides, in pertinent part, as follows:

> (b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a verified answer or an objection addressed to the matter, signed by the party or by his attorney; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the original process upon him. If objection is made, the reasons therefor shall be stated. The answer shall admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. A denial shall fairly meet the substance of the requested admission, and when good faith requires

that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. He may, subject to the provisions of Rule 4019(d), deny the matter or set forth reasons why he cannot admit or deny it.

(c) The party who has requested the admission may move to determine the sufficiency of the answer or objection. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial."

* * *

"Adopted Nov. 20, 1950, effective June 1, 1951. Amended April 12, 1954, effective July 1, 1954; April 18, 1966, effective May 9, 1966; Nov. 20, 1978, effective 120 days after Dec. 16, 1978; amended and effective Oct. 16, 1981."

A careful analysis of Rule 4014(b) indicates that the trial judge properly applied Pa.R.C.P. 4014(c).

The focal point of the post-trial complaint of Allied was that the trial judge erred as to plaintiff's "Request

for Admission of Fact, Request No. 3," which asked Allied to admit as follows:

> Pursuant to the regulations identified in Request Number 2 [Federal Motor Carrier Safety Regulations Of The Department of Transportation], at the time and place of the accident in suit, ALLIED VAN LINES, INCORPORATED had exclusive control of the aforesaid tractor-trailer which was involved in the accident and was legally responsible to the Plaintiff for the manner of operation of the said tractor-trailer.

Allied filed the following response:

> Allied Van Lines had exclusive and complete control of the subject tractor and trailer and Allied Van Lines was legally responsible for the operation of that vehicle and responsible to the Plaintiff in that the Plaintiff was an employee of Allied Van Lines.

The phrase "in that the Plaintiff was an employee of Allied Van Lines" was a self-serving conclusion and surplusage as to the plaintiff's employment status. It was unnecessary and inappropriate for purposes of admitting or denying the matter set forth in the Request for Admission. What Allied endeavored to do is to pretend that its submission was the plaintiff's admission. The law does not countenance such efforts at forensic trickery. Under Pennsylvania law a request for admission should generally not be utilized for purposes of advancing a legal conclusion. See e.g. *J-Mark, Inc. v. Post,* 23 D.&C.3d 317 (Erie County 1982).

If Allied could not respond to plaintiff's request for admissions, it should have objected specifically in the precise manner contemplated by the procedural rules. Otherwise, the matter is deemed admitted in the form presented by the requesting party.

A complaining party carries the burden of showing prejudice stemming from a request for admission. See generally *Innovate, Inc. v. United Parcel Service, Inc.*, 275 Pa. Super. 276, 284, 418 A.2d 720, 724 (1980). Allied certainly did not demonstrate how the ruling of the trial court prejudiced it or caused an unjust result. The parties had the opportunity to present, for the consideration and evaluation by the jury, many pieces of evidence ranging from direct testimony to deposition testimony to exhibits to admissions.[11] Allied failed to show how this specific item of evidence could possibly have prompted the jury to reach a contrary verdict.

The trial judge acted properly and within his discretion in refusing to permit Allied to use its own answer to a Request for Admission as though it were the requesting party and as though plaintiff was the responding party.

E. ALLIED'S ALLEGATION THAT PLAINTIFF PERPETRATED A FRAUD ON THE COURT WAS WITHOUT MERIT

Allied complains on appeal that the plaintiff committed "fraud on the court by falsely testifying that he was not working when the accident occurred."

At the outset, we are compelled to comment that this was not the first time that counsel for Allied has mis-

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11. In fact, counsel for Allied stipulated, at pre-trial conference, to the use of admissions filed in *Weinberg* litigation in this case. See N.T. (April 10, 1984) 55-56.

guidedly hurled accusations of fraud against his opponents.

In *Jistarri v. Feutress*, March Term, 1978, No. 4761, slip op. at 22-23 (Philadelphia County, 1984),[12] cited by Allied (Brief at 53) the court *en banc* (Kremer, J., Mirarchi, A.J., and Greenberg, J.) disapproved of Mr. O'Brien's conduct and cited DR8-102(B) of the Code of Professional Responsibility. The Jistarri court found that Mr. O'Brien improperly made charges of fraud and was guilty of deliberate and reckless professional misconduct.

In *Ellison v. Carl E. Widell & Son, Inc., et al.*, Civil Action No. 82-0297, the highly respected United States District Court Judge for the Eastern District of Pennsylvania, J. William Ditter, Jr., by Memorandum and Order dated June 25, 1984, imposed a fine and sanction of $100.00 to be paid by Mr. O'Brien to plaintiffs' counsel for making "scandalous allegations of fraud" and for "bad faith" and because "counsel's conduct can only be characterized as vexatious and intended to multiply these proceedings unreasonably." The order was affirmed on August 6, 1985 by the United States Court of Appeal for the Third Circuit. A petition for rehearing before the Court *en Banc* was rejected. See 772 F.2d 893-94 (1985). A Petition For a Writ of Certiorari was denied by the Supreme Court of the United States on January 21, 1986 at Docket No. 85-921. See — U.S. —, 106 S.Ct. 855, — L.Ed.2d — (1986).

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12. A summary of the December 31, 1984 sixty-four page slip opinion of the court *en banc* is reported at 12 Phila. 103 (Mar. 1985). The Superior Court of Pennsylvania (Docket No. 00912 PHL 1984) reversed on other grounds by memorandum dated February 7, 1986. Judge Stephen J. McEwen, Jr., dissented. An Application for Reargument is pending. See 503 Pa. Rptr. No. 3 (March 7, 1986) at 7.

Nevertheless, we address on the merits the accusations raised in this case by Mr. O'Brien as counsel for Allied.

Allied argued that Mr. Wilkerson "committed fraud on the court by concealing his prior position as presented to the New Jersey Labor and Industry Division of Workers' Compensation." Allied asserts that "it appears incontrovertible that Plaintiff committed perjury at trial."

In our view, counsel for Allied resorted to the worst form of sesquipedalianism.[13] A review of the record in its entirety indicates there was no "incontrovertible" evidence of fraud on the court or of perjury.

Since Mr. Wilkerson applied for and received benefits under the workmen's compensation law of New Jersey, Allied would have this reviewing court find perjury in the plaintiff's answers to questions from Fruehauf's counsel with regard to whether he had been paid and whether his working day had come to a conclusion prior to the accident. There was no evidence from Allied that Andrew Wilkerson ever represented that his working hours, on the day of the accident, were anything different from his trial testimony.

There can be no perjury or fraud on the court if an injured, non-negligent victim, seeking to protect his right to compensation in all possible fora, characterizes himself as an employee for one purpose and under one set of facts and not an employee for other reasons and in a different situation.

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13. For other comparable forms, see, e.g., *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291, 296 (5th Cir. 1978) and *Star v. Simonelli*, 76 A.D.2d 861, 428 N.Y.S.2d 617 (2d Dept 1980).

Allied brazenly attempted to classify the application for benefits under the workmen's compensation law of New Jersey by Mr. Wilkerson as an irrebuttable statement by plaintiff that, at the time of the accident, he was physically working. There was no "false swearing" in the effort by Andrew Wilkerson to prove that, although he was not injured while he was actually engaged in work, he nevertheless could receive workmen's compensation under New Jersey Law.

In the New Jersey Workman's Compensation litigation, Allied denied any relationship with Andrew Wilkerson. As respondent to the claim petition filed by plaintiff, Allied declared that Andrew Wilkerson "was not in employ of respondent at time of alleged accident." Allied further stated that plaintiff "is not now nor never has been employed by Respondent."[14]

In this respect, at least, it was better for purposes of preventing possible prejudice to Allied that the trial judge abstain from allowing the parties to present evidence to the jury from the New Jersey Workmen's Compensation proceeding.

Moreover, Allied fell short of demonstrating how it was directly prejudiced by Mr. Wilkerson's trial testimony. In following the guidance of the *Proctor* case (see discussion at Part III, *supra*) we were of the view that Mr. Wilkerson could have had some characteristics of

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14. In the compensation case, the New Jersey tribunal agreed with the position advanced by Allied. This also highlights Allied's duplicity in trying to use its answer to plaintiff's request for admission as an admission of employment. See Part IV D, *supra*.

an "employee" and still have been entitled to recover from Allied, as a member of the traveling public.

We have not considered this issue only in terms of semantics and Lewis Carroll logic.[15] We examined the matter under well-entrenched jurisprudential notions.

Mr. Justice Oliver Wendell Holmes, Jr., aptly put it this way in *Towne v. Eisner*, 245 U.S. 418, 425, 38 S. Ct. 158, 159, 62 L.Ed. 372, 376 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

In *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934), *affirmed*, 293 U.S. 465, 55 S. Ct. 266, 79 L.Ed. 596 (1935), Judge Learned Hand cogently wrote that "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."

In *Petry v. General Motors Corporation, Chevrolet Division*, 62 F.R.D. 357, 361 (E.D. Pa. 1974), *citing Lockwood v. Bowles*, 46 F.R.D. 625, 631-32 (D.D.C. 1969), Judge Gorbey declared: "Courts have found fraud upon the court only where there has been the most egregious conduct involving a corruption of the judicial process itself.

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15. As Humpty Dumpty said, in rather a scornful tone, to Alice:

"When I use a word, it means just what I choose it to mean —neither more nor less." See C. L. Dodgson, *Through The Looking-Glass* (1872).

Examples are bribery of judges, employment of counsel to 'influence' the court, bribery of the jury, and the involvement of an attorney (an officer of the court) in the perpetuation of fraud."

In the context of the facts of this case, the charge of fraud by Allied against plaintiff was totally without merit. There was no excuse whatsoever for Mr. O'Brien to make such an intemperate accusation. There is more to the proper practice of law than reckless and malicious and unsupported accusations against one's colleagues and peers.

For these reasons, Allied's request for a new trial on the basis of "fraud on the court" was properly rejected.

F. THE CHARGE OF THE COURT WAS PROPER

Counsel for Allied, in somewhat vague fashion, complains, in his Rule 1925(b) statement, as to "[i]nstructions to the jury which, in effect, removed certain issues of fact from the jury's consideration, which removal usurped the function of the jury."

A review of the charge in its entirety reveals that the instructions were correct, thorough and evenhanded. The trial judge gave a proper statement of the law, in comprehensive virtually hornbook fashion, on liability and damages in the context of a personal injury claim based on negligence.

In *Riddle Memorial Hospital v. Dohan,* 504 Pa. 571, 576, 475 A.2d 1314, 1316 (1984), Mr. Justice Zappala stated:

> "It is well settled in our Commonwealth that when the propriety of the jury instruction of the trial court is at issue, those instructions must be viewed *in toto* to determine if any error has been committed. Unless the charge as a whole can be demonstrated to have caused prejudicial error, we will not reverse for isolated inaccuracies. *McCay v. Philadelphia Electric Co.*, 447 Pa. 490, 291 A.2d 759 (1972). *Vanic v. Ragni*, 435 Pa. 26, 254 A.2d 618 (1969)."

The defendant failed to demonstrate that the court's instructions caused prejudicial error. We review the five contentions of Allied as to error in the charge.

1. re "MEMBER OF THE PUBLIC"

Allied argued that "[t]he factual issue of whether the Plaintiff was a 'Member of the Public' was improperly withheld from the jury."

According to Allied "[t]he jury charge left no latitude for the jury to decide the facts." Nothing could be further from the truth. Allied's contention that the trial judge removed such factual issue from the jury's consideration is incorrect.

A thorough review of the charge of the court on this issue (N.T. 11.32-11.43) reveals that the status of the plaintiff was submitted to the jury as a factual question. For example, the court instructed the jury:

> "I am leaving it to you to determine whether Mr. Wilkerson was a member of the traveling public, so that he comes within the protections laid down by the Interstate Commerce Commission for the regulation of operation of such a vehicle on the public highways, placing responsibility upon Allied in the event a person in the traveling public is injured because of the negligence of the operator of the vehicle."

The trial judge then extensively enumerated the various factors that the jury could evaluate in deciding the issue of what makes a person a member of the traveling public.

In any event there was no possible prejudice to Allied. The issue of the status of plaintiff was such that, in the context of the record of this case, the judge could have instructed the jury that, as a matter of law, Mr. Wilkerson was a member of the traveling public. Instead, the trial judge, as requested by Allied, submitted the issue as a factual one for the jury. The trial judge, in an abundance of caution, bent over backwards in favor of Allied. The charge as a whole on this subject was fair under the evidence produced at trial. Allied had no grounds for complaint.

2. re INSPECTION BY FRUEHAUF

Allied argued that "[t]he factual issue of whether the inspection by Fruehauf was proper was withheld from the jury and improperly decided by the Court."

This post-trial complaint by Allied, with regard to the court's charge as to Fruehauf's inspection, relates to the statement by the court that "[e]xperts for both the plaintiff and Allied agree that the cause of the accident was not a failure of the tractor brakes." See N.T. 11.54. This characterization of the testimony of the experts was inaccurate. However, a painstaking search of the record indicates there was no specific exception by counsel for Allied to this portion of the charge and counsel for Allied has not pointed to any such exception made during the charge. Counsel were given ample opportunity to set

forth their objections to the charge. See N.T. 11.122-11.183. Had a timely objection been made, the misstatement by the court would easily have been corrected.

Pa.R.C.P. 227.1 provides for strict compliance with the principles of *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974) or post trial relief may not be granted. The note to Pa.R.C.P. 227.1(b) states: "If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief."

In *Cherry v. Willer*, 317 Pa. Super. 54, 61-62, 463 A.2d 1082, 1084 (1983), Judge Cirillo referred to the reasoning of Judge (later President Judge) Spaeth in *Carnicelli v. Bartram*, 289 Pa. Super. 424, 433 A.2d 878 (1981) that *Tagnani v. Lew*, 493 Pa. 371, 426 A.2d 595 (1981) required specific assignment of error for an issue to be properly before the court in a civil case on motion for post-verdict relief.

In *In re Trust of Bachman*, 338 Pa. Super. 546, 550, 488 A.2d 27, 29 (1985) Judge Brosky stated that *Cherry v. Willer*, 317 Pa. Super. 58, 463 A.2d 1082 (1983), "is consonant with . . . Pa.R.C.P. 227.1(b)(2) currently in effect (footnote omitted)."

Pennsylvania Rule of Civil Procedure 227.1 articulates the requisites of a motion for post-trial relief. The moving party must specify the ground for relief sought and "how the grounds were asserted in pre-trial proceedings or at trial." The record demonstrates that Allied failed in this regard.

In any event, despite the waiver by Allied, we examined the contention on the merits. In the context of the entire record, we were convinced that the jury understood and considered the theory of Allied that Fruehauf negligently performed the brake inspection and that brake failure caused the accident. The trial judge charged on this precise point numerous times. See e.g. N.T. 11.19, 11.25, 11.26, 11.53, 11.55, 11.59, 11.60 and 11.72.

Allied failed to demonstrate how it was prejudiced or how any isolated error in the court's exhaustive charge impacted on the outcome of the case. Accordingly, the request by Allied for new trial on this ground was properly rejected.

3. re ACTIVE/PASSIVE NEGLIGENCE AND PRIMARY/SECONDARY LIABILITY

Allied contended that "[t]he factual issues of active/passive negligence and primary/secondary liability were improperly withheld from the jury." According to Allied, it "is, at the very most, secondarily liable and Lyle Jordan is primarily liable."

Allied failed to demonstrate how that legal conclusion, even if relevant, could have had any possible impact on the determination of the responsibility of Allied as to Andrew Wilkerson. The proposition advanced by Allied was erroneous for purposes of the jury's assessment of liability. We do not overlook the obvious. Lyle Jordan was not a defendant in this case. Any rights of indemnity by Allied as to Jordan were not involved in this lawsuit. The charge of the court as a whole was proper and in accord with federal law. See e.g. 49 U.S.C. § 304(e)(2). Specifi-

cally, the trial judge correctly charged that "[i]f Lyle Jordan was negligent, and he is charged with doing something in this case, then that would be the conduct of Allied Van Lines, and they would be fully and completely responsible for that." There was no harm in the trial court's valid statement to the jury that the argument "that Allied Van Lines did nothing in this case" was not the issue in this case.

Indeed, as discussed, *supra*, under the applicable federal regulations, Allied completely assumed responsibility for the possession, control, and use of the tractor-trailer. See e.g. 49 C.F.R. § 1057.4(a)(4). The jury could well have found, under the evidence in this case, that Allied was more than "secondarily" or "passively" responsible, but rather "primarily" and "actively" liable for any brake failure and/or driver error.

The cases on indemnity concepts relied upon by Allied were inapposite. The charge of the court on all issues of negligence and liability was proper and appropriate. Accordingly, Allied's "active/passive" and "primary/secondary" allegations did not require or justify the grant of a new trial.

4. re "JOINT VENTURE" STATUS

Allied asserted that "[t]he factual issue for determination of Joint Venture status was improperly withheld from the jury." Allied complained that its proposed jury instruction #28 should have been read to the jury as follows:

> "Members of the jury, if you find that, pursuant to the contract between Allied Van Lines and Fisher

> & Brother, Allied Van Lines had the right to control the activities of Lyle Jordan, you may find that Lyle Jordan was an employee of Allied Van Lines and that Andrew Wilkerson, by virtue of his status as Lyle Jordan's helper, was also an employee of Allied Van Lines."

The trial court correctly refused to charge in accordance with that requested point for charge. There was no reason for submission to the jury of the factual issue of the relationship between Jordan and Allied.

Allied contended that it and Lyle Jordan could be construed as joint venturers "consistent with the evidence in the case."

In *National Labor Relations Board v. Tri-State Transport Corporation,* 649 F.2d 993, 995 (4th Cir. 1981), the court held that a trucking firm, engaged in interstate carriage and authorized to operate under a certificate of public convenience and necessity issued by the ICC, was not the employer of a driver *qua* employee. The court set forth the following standard: "A contractor is an employee only if there was a 'layer of carrier regulation put upon the contractor beyond what was required by governmental regulation, impairing the contractor's independence.' (citation omitted)."

There was nothing in the record which *required* that the matter be reconciled by the jury and there was no error in the charge.

Allied also waived any contention of error as to its point #28 by failing to comply with the requirements of the court's Memorandum of Pre-Trial Conference and Case Management Order dated April 11, 1984. The par-

ties were advised in the court's Memorandum of Pre-Trial Conference and Case Management Order, entered pursuant to Pa.R.C.P. 212, that "counsel must be prepared to submit memoranda of law and citations or copies of pertinent cases on legal questions and matters reasonably foreseeable and likely to arise at trial." The court referred the parties to *Tagnani v. Lew*, 493 Pa. 371, 426 A.2d 595 (1981) and *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974).

The Memorandum of Pre-Trial Conference and Case Management Order also directed that, with regard to each point for charge, the parties were to give "specific page reference to where the cited material appears." The court cautioned that "[f]ailure to comply with the provisions of the Case Management Order(s) with regard to Points for Charge may be deemed to be a waiver of any objections to the charge or any part thereof."

Allied raised no specific objection to these proper provisions, and prior to the preparation of the charge Allied offered no legal guidance or support for the proposition which it advanced. Counsel for Allied was of no affirmative assistance in this regard during the charge. Despite this waiver, we considered the merits of Allied's arguments.

A review of the entire record (as discussed at Part III, *supra*) indicates that there was sufficient evidence to submit the liability of Allied to the jury regardless of any employee relationship. Allied did not demonstrate any prejudice since, contrary to the citations by Allied, the existence of a joint venture or the "employee" status of either plaintiff or Jordan would not have immunized

Allied from liability in this case. See generally *Boehm v. Witte*, 95 N.J. Super. 359, 231 A.2d 240 (1967).

Accordingly, the charge was proper and Allied's request for a new trial on this ground was properly rejected.

5. re CONDUCT OF THE COURT

Allied argued that "[i]t is not the function of the trial judge to instruct the jury so that it understands the facts." Allied contended that "the court erred not only in presenting several points for charge to the jury as virtual conclusions of plaintiff's arguments, but also in failing to present several points for charge basic to defendant's case."

Counsel for Allied (with a partisan and jaundiced eye) asserted that the court's charge "was so thoroughly slanted that it virtually directed a verdict in favor of Fruehauf . . ." Allied further complained that the trial judge " . . . through error excluded great portions of evidence which was contrary to the jury's ultimate conclusion based upon such exclusion."

Allied waived any complaints as to the court's conduct except for those instances where proper objection or motion for withdrawal of a juror was made under the mandates of *Dilliplaine* and *Tagnani*.

A review of the entire trial and especially of the extensive hornbook charge by the trial judge demonstrates that the court correctly charged the jury and assured that the rights of all parties were protected.

At the outset of the charge, the trial judge instructed the jury (N.T. 10.14) to "decide this case fairly, impartially, and squarely on the facts as you find them to be . . ."

Any possible claim of prejudicial conduct of the court during trial was effectively negated and removed from the case. For example, the court charged as follows:

> "You will recall, I am certain, that before this trial commenced, you were told that you alone are the finders of fact, and you alone must determine what occurred. You decide the factual questions and disputes. It was your duty to see, and to hear, and to remember and to decide and to reconstruct what most probably happened at the time or times pertinent or important to this case. This duty of remembering all of the facts is the exclusive right and province of the jury."

The trial judge further instructed the jury as follows:

> "You are to judge this particular case, bringing to it your lifetime experience in evaluating the facts of the case submitted to you. Then you judge it without fear, favor or prejudice. Avoid any matters that are not concerned in these proceedings. Anything else is irrelevant.
>
> You must place yourselves in this court of justice as officers of the court, and representatives of the people charged with the duty of participating in the administration of justice. As I have said, you have a duty to dispel from your hearts and your minds any passion, any fear, any favor, any sympathy, any hatreds, or any unworthy emotions that might creep into a juror's deliberations and interfere with her or his calm reflections, or interfere with the proper exercise of your functions as a juror.
>
> You do not decide cases on the basis of whether you like A,B,or C, the attorneys in the case, or whether you like or dislike them, or think that one lawyer is better than the other. You do not decide cases on whether or not you like the judge, or do you not like

the judge. You do not decide cases on the basis of whether or not there is a corporate entity—that is a corporation—involved."

The trial judge repeatedly cautioned the jury during the charge not to be governed by bias, prejudice, or sympathy. See e.g. N.T. 10.27, 10.31, 10.33, 11.84-85, 11.194, and 11.204.

The jury was instructed with regard to its power to reject any recitation of fact by the trial judge. For example, the court charged:

> "It is all part of your ball of wax to decide, together with all issues of fact and all issues of credibility.
>
> If during my charge I leave something out which one of the parties might say is part of the whole story, then you must bear in mind that you are responsible for the whole story. I do not intend to omit anything. I certainly cannot refer to everything. Likewise with the lawyers, if during the arguments, facts were argued, and you do not agree with them, and they were not correct, it is your duty and obligation to remember them. You must act as if I do not intend to omit everything. You are to remember, consider and evaluate.
>
> I will only be giving you some highlights, because it is your duty to remember everything. If I say something incorrectly, as I have said before, it is absolutely your duty to correct it. Have faith in yourselves and review all the evidence. Our study of juries indicates that a panel of jurors, the eleven of you, twelve sometime, sitting collectively in the jury box is more likely to remember more facts about the case than the person wearing the robes and sitting on the bench. I do not say that because of any supposed modesty, I say that to you because it is true. I say it to you so you have faith in yourself in performing that fact finding function.

> I have already indicated to you tha any questions which I have asked, I have not attempted, I do not attempt, and I do not attempt to indicate any opinion concerning the weight which you should give to the evidence or any part of it, and you should not consider it that way. The Court does not favor one side or the other. The Court favors the truth. The Court does ask you to arrive at the truth in this case, and the Court urges you to come back with the truth as determined from all of the evidence that has been offerred, both as to what you feel is in the evidence, and what you feel may not be there that should have been there."

After the trial judge completed introductory remarks covering background and evidentiary concepts he inquired as to whether any counsel had any objections. Counsel for Allied stated that he had no "suggestions or exceptions." The court's instructions on the liability and damages issues in the case were thorough. As discussed, *supra*, there was no error with regard to the specific exceptions taken by Allied. The trial judge gave supplemental instructions in response to the exceptions of counsel and concluding remarks. The trial judge in an abundance of fairness gave counsel one last opportunity for additional exceptions. All counsel replied that they had none. With that, the jury left to begin its deliberations. We reject the baseless assertions as to the conduct of the court. Mr. O'Brien has indulged in spurious attacks on the trial judge.

The conduct by a trial judge in the presence of the jury which is harmful may, in some (extraordinary) circumstances, provide grounds for a new trial. However, bias or prejudice must appear clearly on the record. *Fischer v. Commercial National Bank*, 321 Pa. 200, 184 A.57

(1936). A review of the record discloses fair treatment of all counsel and a fair trial for all parties. There was no bias or prejudice on or off the record.

The trial judge's handling of the case before the jury was one of evenhandedness. A review of the record in its entirety demonstrates that the trial judge acted judiciously. There was nothing in the extensive and comprehensive charge which could be interpreted as demeaning to any counsel or as discrediting any party's case. The trial judge did not take sides and he made it abundantly clear that all factfinding was for the jury and that the jury had a duty to make its independent findings.

In the instances where counsel for Allied made an objection, the conduct of the trial judge was correct and proper. The trial judge acted fairly, appropriately, and responsibly. When he did participate during trial, the trial judge was especially careful to explain to the jury that all matters were for them to resolve.

The trial judge, throughout the proceedings, constantly re-emphasized the fundamental jurisprudential concept that it was for the jury alone to evaluate the evidence and decide the facts. Moreover, a review of the entire record confirms that the jury did properly analyze the case uninfluenced by any conduct of the trial judge.[16]

The primary duty of the trial judge in charging the jury is to clarify the issues so that the jury is able to comprehend the questions they are to decide. See *Crotty v. Reading Industries, Inc.*, 237 Pa.Super. 4, 5-6, 345 A.2d

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16. We note that the trial judge gave all parties the opportunity to poll the jury prior to recording the verdict.

259, 265 (1975). The trial judge properly fulfilled this important duty. The instructions gave the jury a reasonable guide for the determination of the fundamental issues of liability and damages.

The charge was designed to cover all of the numerous and complex factual and legal issues raised by the parties through the course of the trial. A fair reading of the court's instructions demonstrates that the trial judge comprehensively explained all of the issues. It would be quite inappropriate to fault a trial judge for preparing a comprehensive charge in an effort to have the jury understand all of the issues.

In *McCay v. Philadelphia Electric Company,* 447 Pa. 490, 499, 291 A.2d 759, 763 (1972) (citations omitted), the court stated:

> "As in all cases questioning the accuracy of a charge to the jury, we must not take the challenged words or passage out of the context of the whole charge, but [we] must look to the charge in its entirety, against the background of the evidence in the particular case, to determine whether or not error was committed and whether that error was prejudicial to the complaining party."

The charge as a whole was fair and proper. The trial judge gave counsel for Allied full opportunity to present objections during and at the end of the charge. The trial judge properly considered, evaluated, and ruled upon all specific questions that were raised.

In *Jackson v. Spagnola,* — Pa. Super. —, —, 503 A.2d 944, 949 (1986), Judge Cavanaugh cited Judge Hoffman's opinion in *Burch v. Sears, Roebuck and Company,* 320 Pa.

Super. 444, —, 467 A.2d 615, 621 (1983) and declared: "The trial judge has wide latitude in charging the jury as long as he fully conveys to the jury the law of the case."

In the final analysis, a painstaking review of the charge in its entirety "against the background of the evidence" revealed no prejudicial error. See *Whitner v. Lojeski*, 437 Pa. 448, 454, 263 A.2d 889, 892 (1970). See also *Berry v. Friday*, 324 Pa. Super. 499, 503, 472 A.2d 191, 193 (1984) and *Slavish v. Ratajcak*, 277 Pa. Super. 272, 274, 419 A.2d 767, 768 (1980). There was nothing in the court's instructions which required or justified the grant of a new trial.

To summarize, we found Allied's request for new trial to be without merit. Before a reviewing court will order a new trial, the court must conclude that errors at trial led to an incorrect result. See *Nebel v. Mauk*, 434 Pa. 315, 318, 253 A.2d 249, 251 (1969). The burden was on Allied to demonstrate not only the existence of error but that the jury was misled by error to the detriment of Allied. See *Anderson v. Hughes*, 417 Pa. 87, 92, 208 A.2d 789, 791 (1965).

As has been stated in other contexts, it is the duty of the court to enforce the findings of the jury unless the circumstances cry out for judicial interference. See e.g. *Prather v. H-K Corporation*, 282 Pa. Super. 556, 565, 423 A.2d 385, 389 (1980). There were no circumstances in the liability aspects of the factfinder's determination in this case which demanded post-trial judicial interference. A review of Allied's contentions in their entirety[17] indicates

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17. For purposes of completeness we note that Allied briefed, but saw fit not to cite as a matter complained of on appeal,

(Continued on following page)

that Allied failed to demonstrate that it was prejudiced by the rulings and instructions of the trial court.

V. CONCLUSION

We addressed and reviewed all matters complained of on appeal as set forth in Allied's Rule 1925(b) statement. Those contentions were rejected as lacking merit.

Accordingly, for the reasons set forth herein, the court, by order dated September 30, 1985, overruled the post-trial motions filed by Allied and entered judgment for plaintiff and against Allied in the amount of $1,182,027.36 on the molded and amended verdict rendered on July 25, 1984.

BY THE COURT
/s/ Kremer, J.
March 26, 1986

Paul R. Anapol, Esquire
Anapol, Schwartz, Weiss & Schwartz, P.C. for plaintiff
John J. O'Brien, Jr., Esquire
O'Brien and O'Brien Associates for defendant Allied
John S. Kokonos, Esquire
Detweiler, Hughes & Kokonos for defendant Fruehauf (trial counsel)
James M. Marsh, Esquire
LaBrum and Doak for defendant Fruehauf (appellate counsel)

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the trial court's refusal to consider as an admission the response of plaintiff to Allied's expert interrogatory No. 7. See N.T. 8172. There was no error in the ruling precluding Allied from reading into evidence the report of Rolf W. Roley. The witness was never called to testify. His report was obviously inadmissible heresay. It is difficult to suppose that such contentions are presented in good faith.

TEXT OF 49 U.S.C. § 304(e)

Regulations governing use of vehicles owned by others

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operations and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

TEXT OF 49 U.S.C. § 315

Security for protection of public

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications of a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belong[1] to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, pol-

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[1] So in original. Probably should read "belonging".

icies of insurance, or other securities or agreements, to the extent of the sum so paid. The Commission may prescribe, with respect to motor carriers operating within the United States in the course of engaging in transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country, such reasonable regulations concerning security for the protection of the public as the Commission is authorized, by this section, to prescribe for other motor carriers. Feb. 4, 1887, c. 104, Pt. II, § 215, as added Aug. 9, 1935, c. 498, 49 Stat. 557, and amended July 22, 1954, c. 563, § 2 68 Stat. 526.

TEXT OF TITLE 49, CHAPTER X OF THE INTERSTATE COMMERCE COMMISSION RULES & REGULATIONS, SUB CHAPTER A, PART 1057

LEASE AND INTERCHANGE OF VEHICLES

Sec.

Authority: Sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304.

Source: 32 FR 20056, Dec. 20, 1967, unless otherwise noted.

§ 1057.1 Applicability.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 1057.2 Definitions.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common carrier under the provisions of section 206, 207, or 209 of the Interstate Commerce Act, 40 U.S.C. 306, 307, or 309.

(b) *Equipment.* A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

(d) *Regular employee.* A person not merely an agent but regularly in exclusive full-time employment.

(e) *Agent.* A person duly authorized to act for and on behalf of an authorized carrier.

(f) *Owner.* A person (1) to whom title to equipment has been issued, or (2) who as a lessee, has the right to exclusive use of equipment for a period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

(g) *Private carrier.* A person as defined in § 203 (a)(17) of the Interstate Commerce Act.

(h) *Shipper.* A person who consigns or receives property in interstate or foreign commerce.

§ 1057.3 Exemptions.

The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* that the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in possession of the lessee.

(b) *Rail or express vehicles.* To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing.

(c) *Commercial zone operations.* To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission.

(d) *Vehicles without drivers from rental companies.* To the lease of equipment without drivers by an authorized carrier from an individual, copartnership, or corporation, whose principal business is the leasing of equipment without drivers for compensation.

(e) *Non-powered equipment.* To equipment other than a power unit, provided that such equipment is not drawn by a power unit leased from the lessor of such equipment.

§ 1057.4 Augmenting equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it ap-

plies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That subject to the proviso in (c) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(a) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203(b)(4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by a motor vehicle defined in section 203(a)(17) of the Act and is used regularly in the transportation of property of a character embraced within section 203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(b) Where the motor vehicle so to be used in one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(c) Provided, in either instance that prior to the execution of the lease, the authorized carrier receives

and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

(ii) *Automobile and tank truck carriers.* That such 30-day minimum period shall not apply to equipment owned or held under lawful lease by an authorized automobile carrier or tank truck carrier and used in the transportation of motor vehicles or commodities in bulk, respectively, when leased or subleased to other such authorized carriers.

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and the use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carrier; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment. Subject to the exemption provisions of paragraph (a)(3)(i) of § 1057.4, and except to the extent that amounts paid for the same operations to the lessor in the form of specific fuel cost adjustments pursuant to the provisions of the Interstate Commerce Commission's Special Permission Order No. 74-2525, entered February 7, 1974, and modified February 8, 1974, or designated surcharge procedures, compensation paid by the lessee shall, on and after Februady 15, 1974, be increased by an amount equal to the increased costs of fuel purchased at lawful process and borne by the lessor, provided the lessor is responsible for supplying the fuel consumed in operations conducted under the lease. The amount of such increase shall be; (i) Added to the compensation paid the lessor for leased equipment; and (ii) computed by: (A) Subtracting from the lawful prices actually paid or to be paid by the lessor (and authenticated by him by presentation to the lessee of valid receipts for fuel actually purchased) and consumed in the operation for which the equipment is leased, the lawful price paid by the lessor of the same type of fuel in effect May 15, 1973, provided fuel was purchased by him on that date; and (B) reducing such difference by any amounts as are paid for the same operations to the

lessor in the form of specific fuel-cost adjustments resulting from increases in the carriers' rates or charges obtained subsequent to May 15, 1973. In the event fuel was not purchased by the lessor on May 15, 1973, the purchase date to be used in lieu thereof for the computations required in (ii) above shall be: (a) The date of the purchase of fuel last preceding May 15, 1973; or, (b) if the equipment was first leased on a date subsequent to May 15, 1973, the date of the lessor's first purchase of fuel for operations conducted under a leasing arrangement. Subject to the right of the lessee to delete confidential business information shown thereon which may be used to the detriment or prejudice of the shipper or consignee, the contract shall provide that the lessee, on demand of a lessor whose compensation under such lease is based upon a percentage or division of revenue, will, at the lessee's option, either provide the lessor a copy of each extended freight bill covering the transportation involved, or make reasonable arrangements for the lessor to inspect the same. The contract also shall specify, regardless of the method or manner in which compensation of the lessor is determined, the terms and conditions as to when payment of compensation is due and payable to the lessor and the circumstances, if any, when such compensation, in whole or in part, will be withheld.

(6) *Duration to be specific.* Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of

the Department of Transportation. However, where carriers leasing equipment are commonly controlled and jointly maintain and administer a uniform safety program, no such inspection at the point of lease is required; *provided*, that both carriers remain under common control and the equipment be inspected within the 24 hour period immediately preceding the time of augmentation and found to meet the requirements of the Motor Carrier Safety regulations of the Department of Transportation. The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. When such an inspection has been made, the authorized carrier or an officer or partner thereof, or a safety director or other supervisory employee responsible for safety compliance, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized to do so by such carrier as its representative. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:

Make ..... Year .....
Model ..... Serial No. .....
Type: Tractor ..... Trailer .....
Semitrailer .....
License plate No. ..... State .....

Owner's name .....
Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	Not defective	Defective	Description of defect
Body			
Brakes			
Cooling system			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			

Any other items requiring attention _____

_____

I hereby certify that on the ——— day of ———— ——— I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

_____

(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was

competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of: _____

_____

(Name of authorized carrier)

_____

(Signature of carrier, partner, officer, safety director, or other supervisory employee responsible for safety compliance.)

Date _____

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carried as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract or other arrangement is carried on the equipment, as provided in

paragraph (a)(7) of this section, the authorized carrier or its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such employment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is

operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier. [5 U.S.C. 553 and 559]

[32 FR 20056, Dec. 20, 1967, as amended at 33 FR 2848, Feb. 10, 1968; 39 FR 6525, Feb. 20, 1974; 41 FR 10228, Mar. 10, 1976; 42 FR 39667, Aug. 5, 1977]

§ 1057.5 Interchange of equipment.

Authorized common carriers may be contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Interchange agreement to be specific.* The contract, lease, or other agreement providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration of such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees as

agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Operating authority of carriers participating in interchange.* The certificates of public convenience and necessity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement and service from and to the point where the physical interchange occurs.

(c) *Through bills of lading required.* The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local proportional rates.

(d) *Safety inspection of equipment.* It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 1057.4(c). Equipment which does not meet the requirements of that paragraph shall not be operated in the respective services of the interchange carriers until the defects have been corrected. Where carriers interchanging equipment for a through movement of traffic are commonly controlled and jointly maintain and administer a uniform safety program, no such inspection at the point of interchange is required; *Provided,* that the equipment interchanged has

been so inspected immediately prior to the start of the movement in which the interchange occurs and found to meet the requirements of § 1057.4(c).

(e) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall identify such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles). Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service. Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) *Connecting carriers considered as owner.* An authorized carrier receiving equipment in connection with a through movement shall be considered the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination or return of the equipment after the movement is completed.

[32 FR 20056, Dec. 20, 1967, as amended at 33 FR 2848, Feb. 10, 1968]

§ 1057.6 Rental of equipment to private carriers and shippers.

(a) *Rental of equipment with drivers.* Unless such service is specified in their operating authorities, authorized carriers shall not rent equipment with drivers to private carriers or shippers, except where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of section 203(b) (7) or (8) of the Interstate Commerce Act.

(b) *Rental of equipment without drivers.* Authorized common carriers shall not rent equipment without drivers to private carriers or shippers and authorized contract carriers shall not so rent such equipment without first having obtained approval of the rental contract from this Commission, except that the prohibitions contained in this section shall not apply to authorized carriers transporting property wholly for and on the billing of railroads or where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of section 203(b) (7) or (8) of the Interstate Commerce Act.

No. 87-2091

In The

Supreme Court of the United States

October Term, 1988

ALLIED VAN LINES, INC.,

Petitioner,

vs.

ANDREW WILKERSON,

Respondent,

-and-

FRUEHAUF TRAILER, A Division of Fruehauf Corporation,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT ANDREW WILKERSON

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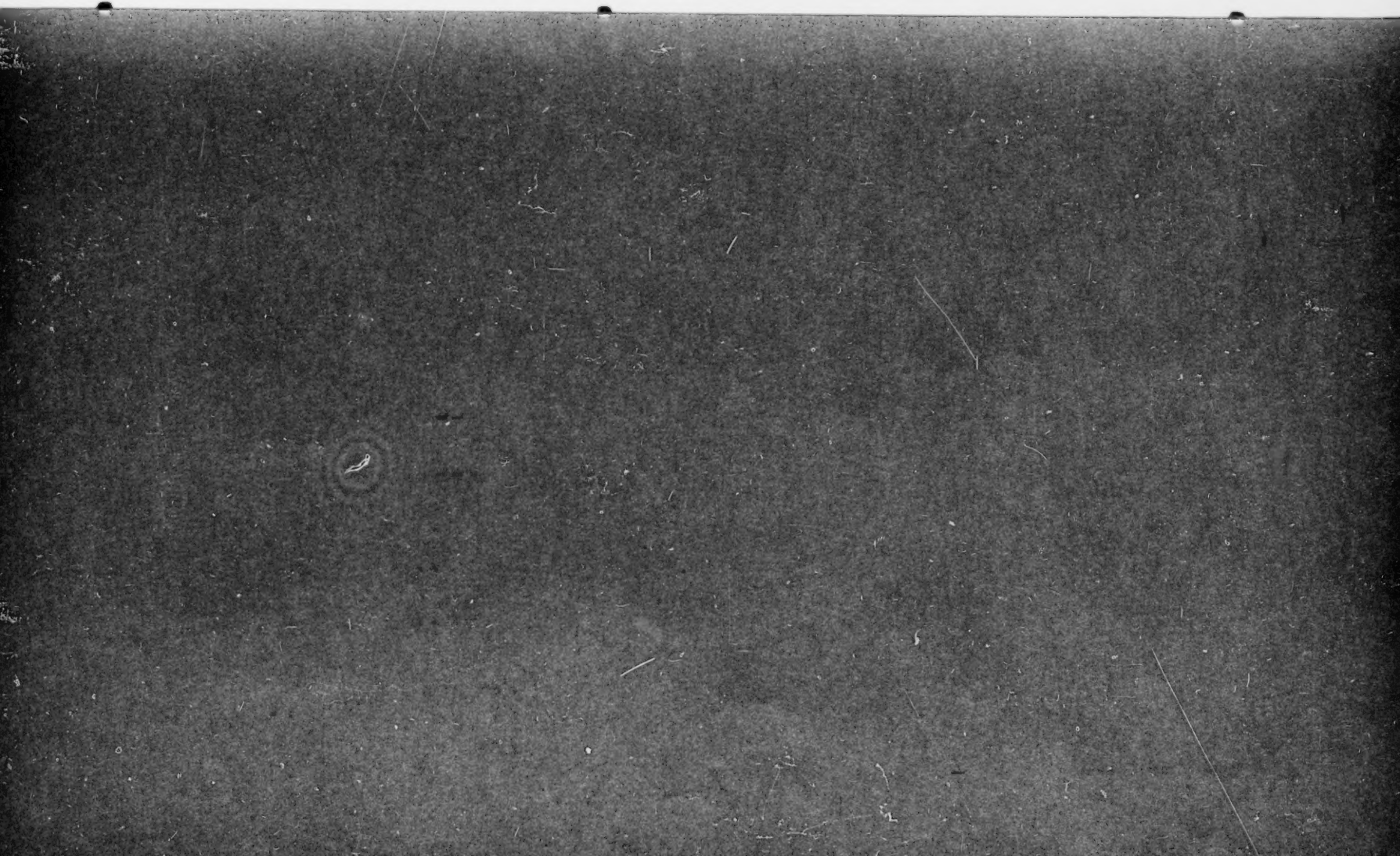

QUESTION PRESENTED

Do the provisions of the Interstate Commerce Act at 49 U.S.C. §§ 304 and 315, and I.C.C. Regulations at 49 C.F.R. § 1057, *et seq.* under which an I.C.C. licensee is liable to shippers and to the public for negligent maintenance and/or operation of a vehicle by its owner-operator, extend to include liability for injuries sustained by a passenger in the vehicle who had completed his day's work as a loader of the truck before the vehicle was moved, and who, when he did work for the owner-operator, was only an occasional, part-time furniture loader, hired for a number of hours of work, exclusively intrastate, to help load furniture onto the vehicle, but not drive the vehicle.

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On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT ANDREW WILKERSON

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of Facts

Petitioner Allied Van Lines is a Delaware Corporation operating as a common carrier in interstate commerce, engaged in the transportation of household goods, pursuant to authority granted to it by the Interstate Commerce Commission in its Certificate of Public Convenience and Necessity, No. MC-15735 and various sub-numbers. On June 16, 1977, respondent Andrew Wilkerson incurred catastrophic personal injuries as the result of a collision caused by the negligent operation of the vehicle by its uninsured and impecunious owner-operator, Jordan, while Wilkerson was riding as a passenger in the vehicle. Respondent Wilkerson had completed his work for the owner-operator earlier that day. Wilkerson worked from time to time as a helper, assisting in the loading of furniture into a few different owner-operators' trailers when they were in the general locale of Wilkerson's home in northern New Jersey. At the time of the accident, the tractor-trailer was subject to a lease agreement by which the owner-operator had leased the tractor-trailer to Fisher and Brother, Inc. The latter had, in turn, leased the vehicle to Allied Van Lines, under whose Certificate of Public Convenience and Necessity the vehicle was being operated. At the time of the accident, Mr. Wilkerson was not a licensed tractor-trailer operator; in fact, had never driven a tractor-trailer, nor was he a person whose presence on the job was in any way required by I.C.C. Regulations or any of the leases, but was merely a furniture mover's helper. In fact, at the time of the accident, his day's work of helping load the trailer had been completed, he had been paid in cash by the owner-operator and he was simply catching a ride part of the way home as a matter of his convenience.

At the time of the accident, Wilkerson was not engaged in any work for Allied, the owner-operator, or anyone else. He was

never a part of any I.C.C. mandated driving team and the vehicle was not required to have two operators, nor was a helper to load the furniture required by regulations or lease.

Petitioner Allied had argued below, in the trial court, in the Superior Court of Pennsylvania and in the Pennsylvania Supreme Court, that the issue is whether Wilkerson was an employee of the owner-operator of the vehicle and whether he has the status of a member of the travelling public for the purpose of imposing liability based upon the I.C.C. Regulations on the I.C.C. license holder. Petitioner Allied has failed in its petition for writ of certiorari to admit that in the particular facts of this case Wilkerson was not, at the time of the accident, working for anyone, but was no more than a hitchhiker in the vehicle. At the time of this accident his work of helping to load the vehicle had been completed and he had been paid before the accident occurred.

B. Procedural History of the Case

The case arose out of a two-vehicle accident which occurred on June 16, 1977, in northern New Jersey. Suit was instituted against Allied Van Lines, Inc. and Fruehauf Trailer, a Division of Fruehauf Corporation.

At the trial, Allied insisted that the issue of whether or not Wilkerson was a member of the travelling public under the applicable federal regulations was an issue of fact for the jury, rather than an issue of law for the court. The jury decided that under the particular facts of the case, Wilkerson was a member of the travelling public. On appeal to the Pennsylvania Superior Court, Allied argued that the trial judge's instructions to the jury were erroneous. The Superior Court found that the trial judge had committed no error and that in any event under the particular facts of this case, Wilkerson was, as a matter of law, simply another member of the travelling public and entitled to the

protection of the Interstate Commerce Act and the regulations promulgated by the I.C.C. Following the decision of the Pennsylvania Superior Court, Allied filed a petition for allowance of appeal to the Supreme Court of Pennsylvania which, after briefing and oral argument, dismissed the petition as being improvidently granted.

REASONS FOR DENYING THE WRIT

The decision below is based upon the precise facts of the case and is not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit. *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979). That decision was based upon the fact that the lease agreement and the federal regulations involved in that case, required the vehicle to have two drivers, each of whom was an "indispensable part of the interstate driving team".

In the instant case, the facts are simply different. Mr. Wilkerson was not a member of a federally mandated two-person driving team. Neither federal regulations nor the lease agreement between Allied and Fisher & Brother, or Fisher and the owner-operator, required the owner-operator to employ another driver or helper to assist in loading the vehicle.

In reaching its decision under the facts of the instant case that Wilkerson was a member of the travelling public, the Pennsylvania Superior Court pointed out that the accident had not occurred until after the work for which Wilkerson had been hired, *i.e.*, loading the trailer, had been completed, and that Jordan was gratuitously providing Wilkerson transportation to a convenient destination.

It is important and factually unique to the instant case to note that unlike the facts in the *White* case where the Court of

Appeals concluded that White was in effect a "statutory employee" of the I.C.C. license holder under the law of Georgia (the state where the accident occurred), and a "statutory employee" under Georgia law, was barred from a recovery in tort against his "statutory employer" and limited to a recovery under worker's compensation. The law of New Jersey (where the instant accident occurred and which by stipulation of the parties governed the facts of this case), is totally different. A "statutory employee" is not limited to worker's compensation benefits in New Jersey, but may proceed in tort against his "statutory employer". *Boehm v. Witte,* 95 N.J. Super. 359, 231 A.2d 240 (1967). Therefore even if Mr. Wilkerson were considered to be a "statutory employee" of petitioner Allied at the time of the accident, that would not preclude him from maintaining a third party action against Allied.

In the instant case Allied at all times denied, under oath that Wilkerson was its employee, its statutory employee or that he had any relationship to it whatsoever. Factually, Allied never paid one cent of worker's compensation benefits to anyone, and as pointed out above, under New Jersey's worker's compensation law, even if they had, it would not have barred recovery by Wilkerson, but merely created a set-off as to any amount paid by Allied. *Boehm v. Witte, supra.*

Wilkerson, when injured, was in no way engaged directly or indirectly in the furtherance of the economic interest of Allied. He was not working for Allied, Fisher, or even the owner-operator at the time of the accident.

In *Proctor v. Colonial Refrigerated Transportation, Inc.,* 494 F.2d 89 (4th Cir. 1974), the Court of Appeals for the Fourth Circuit explained in a well-reasoned opinion that Proctor, an employee of the owner-operator, was not himself the owner or operator of the vehicle, had no contractual relationship with the

I.C.C. license holder, Colonial, and was as much a stranger to Colonial as any shipper of goods in the vehicle or any other member of the public travelling on the highway; hence, was entitled to recover from Colonial for the negligent operation of the vehicle by its owner-operator, operating the vehicle under the auspices of the I.C.C. license holder, Colonial, at the time of the accident.

Factually, Mr. Wilkerson had been hired by the owner-operator, not petitioner Allied, for a few hours work on the day of the accident to help him load household furniture at the shipper's home. The loading was completed and as was the custom, the owner-operator paid Wilkerson for the hours of work performed that day.

Wilkerson's work was completed. If it had been convenient for him to do so, he could have walked home from the shipper's home; instead, he asked the owner-operator to drop him off at a convenient spot. Wilkerson was simply catching a ride in the vehicle to a convenient drop-off point when the accident occurred due to the failure of the tractor-trailer to negotiate a steep curving hill, either due to the negligent operation of the vehicle by the operator or the defective condition of the vehicle's brakes.

No provisions of the I.C.C. Regulations or the leases, required or prohibited the owner-operator from giving a ride to a hitchhiker, having someone help him load household furniture, or loading the furniture himself.

The charges imposed on the shipper, and the compensation of Allied, Fisher & Bros. and the owner-operator were all based on the amount of household goods carried and the distance the furniture was to be carted, and had nothing whatsoever to do with time of loading, the shipment or number of helpers, if any.

In short, the presence of Wilkerson in the vehicle at the time

of the accident was factually less related to the I.C.C. license holder than the presence of the shipper's furniture in the vehicle. Clearly, the I.C.C. Regulations require Allied, the license holder, to pay damages to the shipper and to any other member of the public using the highway should injury occur due to the negligence of the owner-operator or the defective condition of the "borrowed vehicle". *Proctor v. Colonial Refrigerated Transportation, Inc., supra.*

It is critical in the analysis of the issue to look at the historical and public policy reasons for the federal regulations involved. The historical and policy reasons are best expressed in *Price v. Westmoreland,* 727 F.2d 494 (5th Cir. 1984) by the Court of Appeals for the Fifth Circuit:

> "In order to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles, Congress in 1956 amended the Interstate Common Carrier Act to require a motor carrier to assume full direction and control of leased vehicles. 49 U.S.C. § 10927(a)(2) and § 11107(a)(4)(formerly 49 U.S.C. § 315 and § 304(e)(2) respectively). Pursuant to these regulations the ICC has promulgated written lease requirements for interstate carriers . . . which require the carrier lessee to 'assume complete responsibility for the operation of the equipment for the duration of the lease'. 49 C.F.R. § 1057.12(d)(1)."

The owner-operator, as it turned out, was uninsured and judgment-proof, hence Wilkerson, like any other member of the public using the highway, sought recovery from Allied in tort for his injuries.

Because of the specific facts of this case, the decision reached by the trial court and sustained by the Pennsylvania appellate court is not in opposition to the decision of the Fifth Circuit in *White v. Excalibur, supra.* Nor does the rationale of the decision of the Fifth Circuit in *White* conflict with the decision in this case since, under the facts and the worker's compensation law of New Jersey, the I.C.C. license holder (in that case Superior Trucking Company) in the instant case, Allied, had no worker's compensation liability to Wilkerson, never paid any worker's compensation to Wilkerson, and in a further distinction from *White*, would not under the New Jersey State worker's compensation law been immune from tort liability to a person in Wilkerson's position even if they had been required to pay any worker's compensation benefits to him. It is critical to note, that in the case *sub judice*, Allied denied under oath that Wilkerson was its employee, its statutory employee, or had any relationship of any kind to Allied. Allied was never called upon to pay one cent in worker's compensation to Wilkerson or anyone else relative to the accident which led to this litigation. Contrary to Allied's assertions, there is no conflict between the Fourth and Fifth Circuits. Allied admits in footnote 2 on page 9 of its brief, that the significant difference between the *Proctor* and *White* cases is that no worker's compensation benefits were available in *Proctor*, while they were available in *White*.

To argue as petitioner does that to permit the decision of the Pennsylvania Superior Court in this case to stand would have a serious and widespread impact upon the trucking industry operating in interstate commerce, is to deny reality and to "stuff the rabbit into the hat". The facts of this case are unique. It is inconceivable that it creates precedent for any case other than one in which a hitchhiker in the vehicle who coincidentally had, earlier in the day, helped load a trailer was injured due to the negligence of the operator and/or the defective condition of the

vehicle, and sued the I.C.C. license holder under applicable federal statutes and regulations.

CONCLUSION

The petition for writ of certiorari to the Superior Court of Pennsylvania should be denied for the following reasons: (1) The decision is not in conflict with a decision of the United States Court of Appeals for the Fifth Circuit. The decision of the state Superior Court reaches the same conclusion as the United States Court of Appeals for the Fourth Circuit, as well as the Court of Appeals of New Mexico, *Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.M. 511, 602 P.2d 195, 200 (1979), and by the Supreme Court of Minnesota in *Schindele v. Ulrich*, ____ Minn. ____, 268 N.W. 2d 547 (1978). The facts significantly differ from the facts in *White* since Mr. Wilkerson was not an "indispensable part of the interstate driving team", was not required by regulation or lease agreement and factually was not even working for the owner-operator at the time of the accident; and (2) There is no conflict between the Fourth and Fifth Circuits. While *Proctor* and *White* reach different conclusions, the cases as petitioner Allied admits, are based on significant differences of fact and significant differences in the interpretation of various state laws as they impact on the rights and obligations of parties; and there is no confusion in the interpretation of the Interstate Commerce Act and the I.C.C. Regulations as they impact on the rights and legal obligations of the parties to this case under the *specific* facts of this case.

Respectfully submitted,

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Attorney for Respondent
Andrew Wilkerson